Supreme Court, U.S.
FILED
01-401 SEP 1 - 2001
OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

DAVID GILCHRIST

Petitioner

vs.

THE ARIZONA SUPREME COURT, CHIEF JUSTICE THOMAS A. ZLAKET; THE STATE BAR OF ARIZONA; DON BIVENS and PATRICIA LEE REFO, husband and wife; JOHN BERRY and BARBARA BERRY, husband and wife; ROBERT SWARTZ and APRIL SWARTZ, husband and wife; GARY S. ENGLE and SUSAN M. ENGLE, husband and wife; FREDERICK J. DIETERLE and JUDY DIETERLE, husband and wife

Respondents

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

DAVID GILCHRIST
210 Hauoli Street
Wailuku, Hawaii USA 96793
(808) 986-0908

AMERICAN FINANCIAL PRINTERS • WASHINGTON, DC • (202) 457-0030

97 pp

QUESTIONS PRESENTED FOR REVIEW

I. Are Arizona's "zero-tolerance" law enforcement policies patently unconstitutional?

II. Do Article III courts ever abstain in favor of patently unconstitutional state action?

III. Do state bar executives and the private citizens that motivate them enjoy absolute immunity from Petitioner's 1983 and diversity claims?

IV. Is the Arizona Supreme Court sufficiently connected to its bar association to be enjoined when association personnel violate the Constitution of the United States?

V. Were the proceedings below so far departed from the accepted and ususal course of judicial proceedings to call for an exercise of this Court's supervisory power?

TABLE OF CONTENTS

BASIS FOR JURISDICTION 1

CONSTITUTIONAL PROVISIONS AND STATUTES . . 1

STATEMENT OF THE CASE 2

ARGUMENT 5
A. Old wine, new bottles. 6
1. E.R. 1.15, *circa* 1994-1998. 6
2. E.R. 1.15, *circa* 1999. 8

I. Are Arizona's "zero-tolerance" policies patently unconstitutional? 9
A. The *ex post facto* clause. 9
B. The bill of attainder clause. 11
1. Does the bill of attainder clause only apply in capital cases? 12
C. The equal protection clause. 12
D. The due process clause. 13
E. The free speech clause. 15
1. Frozen in time. 15
2. "What we have here, is failure to cooperate." 15
F. Strict construction. 16

II. Do Article III courts ever abstain in favor of patently unconstitutional state action? 19

III. Do state bar executives and the private citizens that motivate them enjoy absolute immunity from Petitioner's 1983 and diversity claims? 21

A. Do state bar executives enjoy greater constitutional immunity than the President of the United States? 21

B. Do private citizens who motivate state action enjoy absolute immunity from suit under 42 U.S.C. § 1983? 24

C. Does Arizona's immunity statute protect Respondents from Petitioner's diversity claims? 25

IV. Is the Arizona Supreme Court sufficiently connected to its bar association to be enjoined when association personnel violate the Constitution of the United States? . . 26

V. Were the proceedings below so far departed from the accepted and ususal course of judicial proceedings to call for an exercise of this Court's supervisory power? 28

CONCLUSION 30

TABLE OF AUTHORITIES

Constitutional Provisions

Article I, § 10, Constitution of the United States . 10, 11, 29

Article I, § 9, Constitution of the United States 11

First Amendment of the Constitution of the United States 5, 15, 20

Fourteenth Amendment of the Constitution of the United States 13

Statutes

28 U.S.C. § 1254 1

28 U.S.C. § 1291 1

28 U.S.C. § 1331 1

28 U.S.C. § 1332 1

28 U.S.C. § 1343 1

42 U.S.C. § 1983 . . . . . 1, 21, 22, 24

Rule 4, Fed.R.Civ.P. 13

Rule 31(a)(1), Ariz.R.S.Ct 2, 27

E.R. 1.15, Rule 42, Ariz.R.S.Ct 1, 3, 6-9, 11-14, 17

Rule 46(g)(2), Ariz.R.S.Ct. 2

Rule 49, Ariz.R.S.Ct. 2

Rule 51(i), Ariz.R.S.Ct 15

Rule 54(l), Ariz.R.S.Ct. 26

Cases

Adamo Wrecking Co. v. United States, 434 U.S. 275 (1978) 18

Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970) 24

Bates v. State Bar of Arizona, 433 U.S. 350 (1977). 27

Bouie v. City of Columbia, 378 U.S. 347 (1964) 10

Buckley v. Fitzsimmons, 509 U.S. 259 (1993) 23

Burns v. Reed, 500 U.S. 478 (1991) 23

Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) 25

Busic v. United States, 446 U.S. 398 (1980) 18

Butz v. Economou, 438 U.S. 478 (1978) 24

Carmell v. Texas, 529 U.S. 513 (2000) 12

Clark v. State of Washington, 366 F.2d 678 (9th Cir. 1966) 23

Cummings v. Missouri, 71 U.S. 277 (1866) 11

Ex Parte Young, 209 U.S. 123 (1908) 28

F.E. Trotter, Inc. v. Watkins, 869 F.2d 1312 (9th Cir. 1989) 25

Forrester v. White, 484 U.S. 219 (1988) 22, 24

Gibson v. Berryhill, 411 U.S. 564 (1973) 19

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 24

Hoover v. Ronwin, 466 U.S. 558 (1984) 27

In re Hoover, 155 Ariz. 192, 745 P.2d 939 (1987) 18

In re Ruffalo, 390 U.S. 544 (1968) 18

In Re Wilson, 106 Ariz. 34, 470 P.2d 441 (1970) 18, 27

Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974) 25

Lochner v. New York, 198 U.S. 45 (1905) 29

Malley v. Briggs, 475 U.S. 335 (1986) 24

Marbury v. Madison, 1 Cranch 137 (1803) 20

Marks v. U.S., 430 U.S. 188 (1977) 10

Matter of Thalheim, 853 F.2d 383 (5th Cir. 1988) 18

McBoyle v. United States, 283 U.S. 25 (1931) 18

Mitchum v. Foster, 407 U.S. 225 (1972) 21

Prussian v. United States, 282 U.S. 675 (1931) 18

Richardson v. McKnight, 521 U. S. 399 (1997) 25

Ripplinger v. Collins, 868 F.2d 1043 (9th Cir. 1989) 20

Shapero v. Kentucky Bar Ass'n., 486 U.S. 466 (1988) . . . 22

Supreme Court of Virginia v. Consumers Union, 446 U.S. 719 (1980) 28

Sycuan Band of Mission Indians v. Roache, 54 F.3d 535 (9th Cir. 1994) 20

Tower v. Glover, 467 U.S. 914 (1984) 22

U.S. v. Brown, 72 F.3d 25 (5th Cir. 1995) 18

United States v. Fruit Growers Ex. Co., 279 U.S. 363 (1929) 18

United States v. Price, 383 U.S. 787 (1966) 24

United States v. Scharton, 285 U.S. 518 (1932) 18

United States v. Wiltberger, 5 Wheat (18 U.S.) 76 (1820) 18

Wade v. State Bar of Arizona, 948 F.2d 1122 (9th Cir. 1991) 27

Wyatt v. Cole, 504 U.S. 158 (1992) 25

Other Authorities

Abraham Lincoln's First Inaugural Address (1865) 20

Abraham Lincoln's Second Inaugural Address (1865) . . . 30

Alexander Hamilton, Federalist No. 78, 1788 19

James Madison, 2 Farrand, The Records of the Federal Convention of 1787 19

Long Range Plan for the Federal Courts (1995) 30

Thomas Jefferson to George Hammond, 1792. ME 16:255 30

Thomas Jefferson to Martin Van Buren, 1824. ME 16:55 24

BASIS FOR JURISDICTION

This action arises under the Constitution of the United States, and is brought pursuant to 42 U.S.C. § 1983. The District Court had original jurisdiction over Petitioner's federal question claims under 28 U.S.C. §§ 1331, 1343, and original jurisdiction over Petitioner's diversity claims under 28 U.S.C. § 1332. The District Court entered its final judgment on March 8, 2000, disposing of all parties' claims. Petitioner filed his Notice of Appeal on March 31, 2000. The Ninth Circuit had jurisdiction under 28 U.S.C. § 1291. The Ninth Circuit entered its judgment on March 26, 2001. Petitioner filed a request for rehearing on April 3, 2001. The Ninth Circuit denied Petitioner's request for rehearing on July 12, 2001. Appendix, p. 44. This Court has jurisdiction to review the judgments below under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES

Article I, § 10, Constitution of the United States.

The First Amendment of the Constitution of the United States.

The Fourteenth Amendment of the Constitution of the United States.

42 U.S.C. § 1983.

E.R. 1.15, Rule 42, Ariz.R.S.Ct.

Rule 54(l), Ariz.R.S.Ct.

STATEMENT OF THE CASE

The State Bar of Arizona was created as an integrated organization in 1933, by an act of the Arizona Legislature to serve the legal profession and the public. In 1973, with the concurrence and support of the Legislature, the Arizona Supreme Court drafted Rule 31 creating joint oversight by the Legislature and Court over the State Bar. That joint oversight ended in 1983 when the Arizona Legislature "sunsetted" its 1933 State Bar Act.[1]

Despite a statutory duty[2] to direct and control its bar association, the Arizona Supreme Court's Chief Justice admits his court has never really exercised a sufficient degree of oversight over its agents at the State Bar of Arizona.[3] In their pleadings below, Chief Justice Zlaket and his court disclaimed all supervisory responsibility for their legal ethics enforcers.[4]

---

[1] *See* http://www.azbar.org/StateBarInfo/history.asp.

[2] "Establishment of State Bar. In order to advance the administration of justice according to law; to aid the courts in carrying on the administration of justice . . . the Supreme Court of Arizona does hereby perpetuate, create and continue under the direction and control of this court an organization known as the State Bar of Arizona." Rule 31(a)(1), Ariz.R.S.Ct.,

[3] "The State Bar is an arm of the Supreme Court in this state and I think that it is incumbent upon this court to exercise some degree of oversight with respect to its activities. That does not mean that we should micromanage its activities and we will not attempt to do that. It does mean that the court should pay attention to what is going on in that organization. I don't believe the court has ever really exercised a sufficient degree of oversight." Thomas A. Zlaket, Chief Justice Arizona Supreme Court, Dkt. 35., Ex. 1.

[4] "In Arizona, it is the State Bar's 'bar counsel' that prosecute disciplinary proceedings. Ariz.R.Sup. Court., 46(g)(2) and 49. The bar counsel are

Petitioner is a member of Arizona's mandatory bar association. (Dkt. 1, para. 16). In 1994 Defendant Dieterle hired Petitioner under a fee agreement that contained a lien securing payment. (Dkt. 1, 38-42, 72). Petitioner rendered legal services to Defendant Dieterle in 1994. (Dkt. 1, 43-48). Defendant Dieterle paid Petitioner for his services in 1998. (Dkt. 1, paras. 69-79). At no time did Defendant Dieterle give Petitioner any property for safekeeping. (Dkt. 1, paras. 90-91).

In 1999 the State Bar of Arizona convicted Petitioner of violating E.R. 1.15 SAFEKEEPING PROPERTY. As written, E.R. 1.15 only applies to lawyers entrusted with property for safekeeping.

However, by 1999 the State Bar of Arizona was construing the Arizona Supreme Court's quasi-criminal laws on a "case-by-case basis." Defendant Bivens explained case-by-case construction in an article published in Arizona's largest newspaper, two months prior to Petitioner's conviction:

My Turn
For The Arizona Republic
By Don Bivens
President, State Bar of Arizona
March 15, 1999.

> No doubt you have read the headlines about Carmen Fischer, a lawyer accused of having a sexual relationship with her client, a convicted

---

supervised by the 'chief bar counsel,' an administrator appointed by the State Bar. Ariz.R.Sup. Court., 46(g)(2) and 49(a). Thus, Arizona Supreme Court does not even have 'general supervisory power over the persons responsible for enforcing the challenged provisions.'" Zlaket motion to dismiss, Dkt. 19, p. 8, lines 23-27.

murder. Many people have asked where the State Bar stands on the allegations against Ms. Fischer, and on the code of attorney conduct. As the State Bar President, I wish to weigh in and let the Bar's voice be heard.

The discipline staff at the State Bar of Arizona has opened an investigation into the allegations against Ms. Fischer, and because of that, the Bar cannot comment on Ms. Fischer's particular case. To do so could create a conflict of interest and compromise the fairness of our own impartial investigation.

However, it is important to let the public know how we feel about any lawyer who displays unethical or unprofessional conduct. In regulating attorneys, the Bar's number one goal is to protect the public. The Bar, and the 15,000 fine ethical lawyers who practice in Arizona, have complete disgust for any lawyer whose unethical or unprofessional conduct harms her or his client, and tarnishes the public's perception of our profession and of our justice system. We have zero tolerance for unethical attorneys.

As for our written code of conduct, it is true that the Arizona Supreme Court's ethics rules do not include the specific words that a lawyer cannot have sex with a client. But that does not mean the issue goes unaddressed. The Bar has disciplined attorneys for having sexual relationships with their clients. Such behavior falls under the historic ethical rule that prohibits

> conflicts of interest between lawyers and their clients. What's at issue is not the sex act; but whether the attorney-client relationship has been compromised to the client's potential disadvantage.
>
> It is unrealistic to expect the State Supreme Court to write rules listing every conceivable conflict of interest. Compare the concept to our right to free speech, as guaranteed by the U.S. Constitution. When our Founding Fathers authored the First Amendment, they didn't list every possible scenario in which a person is free to express an opinion. Instead, Judges use the Constitution's guarantee of free speech as a measuring stick to decide cases on an individual basis. The same holds true for the Bar, which uses the conflict of interest rule as its guide when examining questionable attorney-client relationships on a case-by-case basis.

Dkt. 36, Exhibit 19, Appendix, pp. 51-52.

ARGUMENT

The State Bar of Arizona's First Amendment model for statutory construction presumes that the Bill of Rights and state penal laws are the same thing. Actually, the Bill of Rights extends rights, while state penal laws take them away. Arizona's "zero-tolerance" method of construing legal swords in the same liberal manner as federal judges construe Constitutional shields ignores the night and day difference between these two forms of written law.

Defendant Bivens correctly notes that it is impossible to list every exercise of unrestricted speech. However, he draws the untenable conclusion that it is just as impossible to list every act punishable by law. Penal codes do precisely that; they list the conduct that may lead to state deprivations of life, liberty or property. Defendant Bivens describes the Arizona Supreme Court's penal laws as "guides," for law enforcement. Actually, penal laws are written to guide society, before the fact, not law enforcement, after-the-fact.

Left to their own devices, Arizona's bar executives now read the Arizona Supreme Court's quasi-criminal ethics laws as expansively as federal judges read the Bill of Rights. They blend their flexible written laws with unwritten "historic ethical rules," and enforce the resulting "measuring sticks" on a "case-by-case basis." Appendix, pp. 51-52.

A. Old wine, new bottles.

In Latin, "case-by-case" is pronounced *ex post facto*. The State Bar of Arizona's policy of defining misconduct in light of the conduct to be charged is traditional *ex post facto* law enforcement.

1. E.R. 1.15, *circa* 1994-1998.

Petitioner rendered legal services in 1994, and was paid for those services in 1998. During that time period, E.R. 1.15 read as follows:

E.R. 1.15 SAFEKEEPING PROPERTY.

> (a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from

the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

(b) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(c) When in the course of representation a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved.

E.R. 1.15, Ariz.R.S.Ct.

As written, E.R. 1.15 only applies to lawyers entrusted with property for safekeeping.

2. E.R. 1.15, *circa* 1999.

The State Bar of Arizona's "case-by-case" version of E.R. 1.15 was signed into law on May 19, 1999:

> You and Mr. Dieterle signed a fee agreement which included a provision for a lien over the entire settlement of his claim. However, at the time the agreement was signed the amount of your legal fees was not quantifiable nor could you determine what, if any, settlement would be reached. Once your client's case settled you were entitled to a portion of that settlement; the portion equal to your actual fees. As you are undoubtedly aware, your client disputed the amount you ultimately claimed as your fee. In an effort to secure your fee without addressing Mr. Dieterle's concerns, you orchestrated a plan which would prevent the client from ever receiving any portion of his funds without first paying your fee. By claiming a lien on the entire settlement, an amount which was ten times the amount of your fees, and preventing the distribution of any portion of those funds, you violated E.R. 1.15.

May 19, 1999 quasi-criminal conviction, signed by Probable Cause Panelist Kirk v. Karman, Dkt. 43, Exhibit 1, p. 1. Appendix, pp. 31-33.

The State Bar of Arizona's 1999 version of E.R. 1.15 bears little resemblance to the written rule of law quoted above.

The Bar's 1999 conviction uses the word "lien" twice, while E.R. 1.15 does not address liens at all. E.R. 1.15 uses the word "property" 10 times, while the Bar's after-the-fact version never does. The Bar's version includes 13 instances of the words "you" and "your," while E.R. 1.15 contains none. Perhaps because they have so little in common, the Bar's 1999 conviction only mentions E.R. 1.15 once, at the end, and never addresses the title or authoritative text of the statute itself.[5]

I. Are Arizona's "zero-tolerance" policies patently unconstitutional?

The legal devices known as the *ex post facto* law and bill of attainder have been patently unconstitutional in this country since 1788. They are the antithesis of due process and equal protection respectively. When combined with the State Bar of Arizona's "remorselessness" policy, these timeless legal weapons create a chilling legal environment where the only accepted speech includes the word "guilty."

A. The *ex post facto* clause.

The Constitution of the United States was ratified in 1788. From then on, every state in the nation was forbidden from using *ex post facto* laws against American citizens:

---

[5] If it were actually law, Arizona's 1999 "case-by-case" version of E.R. 1.15 would need both a new title, and a new subsection (d):

> E.R. 1.15 SAFEKEEPING PROPERTY; *ATTORNEY LIENS*
> (a) *(no change)*
> (b) *(no change)*
> (c) *(no change)*
> *(d) A lawyer shall not enter into an agreement for services that contains a lien to secure payment for those services.*

> Section 10. No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.

Article I, § 10, Constitution of the United States. (Emphasis added).

The State Bar of Arizona's "zero-tolerance" policy of reading state penal laws on a "case-by-case basis" violates the *ex post facto* clause as a matter of law. In this case, the policy resulted in a new law being written in 1999, and applied retroactively to conduct occurring between 1994 and 1998.

Respondents cannot dodge Article I's *ex post facto* clause by virtue of their association with Arizona's judicial branch. This Court has specifically ruled that the judicial expansion of penal statutes is precisely the same thing as after-the-fact legislation: "an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law, such as Art. I § 10, of the Constitution forbids." *Bouie v. City of Columbia,* 378 U.S. 347, 353-54 (1964). *See also Marks v. U.S.*, 430 U.S. 188, 191-92 (1977). Consequently, it is the effect, and not the form of retroactive legislation that controls:

> The Constitution deals with substance, not shadows. Its inhibition was levelled at the thing, not the name. It intended that the rights of the citizen should be secure against deprivation for past conduct by legislative enactment, under any

> form, however disguised. If the inhibition can be evaded by the form of the enactment its insertion in the fundamental law was a vain and futile proceeding.

Cummings v. Missouri, 71 U.S. 277, 325 (1866).

Common sense dictates that state lawyers be precluded from using the *ex post facto* device against their fellow citizens. Article I prohibits not only the states, but also the United States Congress from using the *ex post facto* method: "No bill of attainder or ex post facto Law shall be passed." Article I, § 9, Constitution of the United States. Congress is the ultimate American elected body, and it has been forbidden from using the *ex post facto* method since 1788. Arizona's bar executives are a small group of unelected, unsupervised state actors. Allowing bar executives more legal power over their fellow Americans than our nation's largest elected body defies common sense.

Arizona's "case-by-case" method of law enforcement violates the *ex post facto* clause.

B. The bill of attainder clause.

The American founders outlawed bills of attainder in the same Constitutional breath as the *ex post facto* method: "No state shall . . . pass any bill of attainder." Article I, § 10, United States Constitution.

E.R. 1.15 has been on the books in Arizona since 1983. It is addressed in the following Arizona Ethics Opinions:

> Opinion No. 88-02, January 11, 1988; Opinion No. 88-06, July 5, 1988; Opinion No. 89-10, December 20, 1989; Opinion No. 90-11,

October 15, 1990; Opinion No. 91-01, January 15, 1991; Opinion No. 91-10, April 2, 1991; Opinion No. 92-1, March 12, 1992; Opinion No. 92-11, November 25, 1992; Opinion No. 93-03, March 17, 1993; Opinion No. 93-14, September 23, 1993; Opinion No. 97-02, January 29, 1997; Opinion No. 97-03, March 3, 1997; Opinion No. 98-06, June 3, 1998; Opinion No. 98-07, June 3, 1998; Opinion No. 99-02, April 1999.

Dkt. 35, pp. 6-7; http://www.azbar.org/EthicsOpinions/.

All of these opinions involve the application of E.R. 1.15 to lawyers entrusted with client property for safekeeping. They confirm Petitioner's fact allegations that the State Bar of Arizona's one-time expansion of E.R. 1.15 operates as a bill of attainder. (Dkt. 1, paras. 84-95, 183 b).

1. Does the bill of attainder clause only apply in capital cases?

The State Bar of Arizona told the Ninth Circuit that the bill of attainder clause only applies in capital cases, citing Blacks Law Dictionary as its authority. (State Bar of Arizona brief, p. 29). An alternative citation might have been *Carmell v. Texas*, 529 U.S. 513 n. 27 (2000)(bills of pains and penalties are a subspecies of bills of attainder, where punishment is something less than death.). State actors need not commit homicide to violate the bill of attainder clause. *Id.*

C. The equal protection clause.

The Fourteenth Amendment's equal protection clause requires the states to apply their laws to everyone equally: "No

State shall . . . deny to any person within its jurisdiction the equal protection of the laws." Fourteenth Amendment of the Constitution of the United States.

When written for a single targeted individual, the bill of attainder is the logical opposite of equal protection, and a *per se* violation of the equal protection clause. The Ninth Circuit never addressed Petitioner's equal protection claims. Appendix, pp. 1-4.

D. The due process clause.

American Due Process requires warning before-the-fact. By definition, the *ex post facto* method gives no warning until after-the-fact. The *ex post facto* is the antithesis of due process, and so a *per se* violation of the Fourteenth Amendment's due process clause.

The Ninth Circuit never addressed Petitioner's due process claim. Appendix, pp. 1-4. Indeed, the only time the Ninth Circuit used the words "due process" was while disposing of Petitioner's bill of attainder claim: "he was provided with due process protections at the disciplinary proceedings." Appendix, p. 4. The Ninth Circuit's fact conclusion is directly contradicted by the facts actually contained in the record.

In June 1998 the State Bar of Arizona began investigating Petitioner for violation of E.R. 1.15. (Dkt. 1, para. 96). In October 1998 the bar dropped E.R. 1.15. (Dkt. 1, paras. 122-23). The next time the bar raised E.R. 1.15 was in Petitioner's May 19, 1999[6] conviction. Appendix, pp. 31-33.

---

[6] The conviction came two days after Defendants Bivens Berry and Swartz were served with this civil rights suit. Defendant Bivens refused to waive service under Rule 4, Fed.R.Civ.P. So did his Bar association. So

Petitioner only learned that Arizona government was again pursuing him under E.R. 1.15 when he received his conviction in the mail. (Petitioner's Excerpts of Record, p. 12).

In an effort to bolster their abstention argument before the District Court, the State Bar Defendants convicted Petitioner of violating E.R. 1.15 a second time, adding some ongoing state proceedings to the second conviction. Appendix, pp. 37-39. Probable Cause Panelist[7] Nicholas Wallwork explained the bar's second *ex post facto* law with the nearly synonymous Latin phrase, *nunc pro tunc*. *Id.* Like its predecessor, the second conviction, arose from a quasi-criminal legal process that was entirely *ex parte*.[8]

The *ex post facto* method is the ultimate example of undue legal process. Arizona's tortured *nunc pro tunc* process takes a bad thing, and makes it much worse. Arizona's "zero-tolerance" law enforcement process violates the Fourteenth Amendment's due process clause.

---

did Defendants Berry and Swartz. Consequently, Petitioner served all four "State Bar Defendants" personally, on May 17, 1999. (Dkt. 8, 9, 11, 12).

[7] The title suggests that there is a "panel" that meets to hold evidentiary hearings. State Bar documents reveal that at the time of Petitioner's various convictions, there was a single Probable Cause Panelist, who doubled as the First Vice President. *See* Board of Governors minutes, May 19, 2000, http://www.azbar.org/StateBarInfo/bog_may.asp.

[8] When Nicholas Wallwork convicted Petitioner a second time, he did so after "having reviewed a request," and upon "good cause shown." (State Bar reply, Dkt. 43, Exhibit 4). Neither the request nor the cause were ever shared with Petitioner.

E. The free speech clause.

The *ex post facto* for one packs a chill all its own. When coupled with yet more Arizona "zero-tolerance" policies, permissible speech drops to near zero.

1. Frozen in time.

Short of hanging, the retroactive target law may be the ultimate chill on free speech. Penal laws written after-the-fact are written to order; tailored with 20-20 hindsight, to precisely match the targeted individual's undeniable, and previously legal conduct. The individual's factual 'guilt' is a legal certainty, as the accused receives the impossible burden of proving himself innocent, of something he clearly did, back when it was legal.

When laws are re-written to match the facts, there are none to dispute. That just leaves the law. However, lecturing unchecked legal bureaucrats on legal fundamentals might be taken poorly. *Ex post facto* might translate into punishment for 'failure to cooperate' under Rule 51(i), Ariz.R.S.Ct. When state action takes the form of the *ex post facto* for one, confession is the only permitted response. For those unwilling to confess, choosing the right words becomes an irreducible riddle.[9] The *ex post facto* is, literally, legally impossible to defend.

2. "What we have here, is failure to cooperate."

"Case-by-case" construction is only one of the State Bar of Arizona's "zero-tolerance" policies. Others include enhanced punishment for "failure to cooperate," (Dkt. 1, para. 108-09,

---

[9] "Give me six lines written by the most honorable man, and I will find an excuse in them to hang him." Cardinal Richelieu, Mirame 1641.

148, 151, 170, 175, 183c), and "remorselessness." (Dkt. 1, 149, 208).

"Failure to cooperate" is nebulous enough to mean whatever its enforcers say it means.[10] "Remorselessness" means a lawyer who refuses to confess. The State Bar of Arizona punishes remorseless lawyers extra hard. (Dkt. 1, para. 149). While the Arizona Supreme Court has condemned the practice as demoralizing and destructive,[11] "remorselessness" remains Arizona government policy.

The State Bar of Arizona's "remorselessness" policy discourages truthful responses to false charges, and so adds to an already substantial First Amendment chill. When unchecked state actors wield the *ex post facto* device, the only accepted speech is confession.

F. Strict construction.

The Dieterle-Engle Defendants asked the State Bar of

---

[10] "Failure to cooperate" is likely defined on a case-by-case basis, according to the principles and sound feelings of the people trusted to police Arizona's lawyers. *Accord*: "Whoever commits an act which deserves punishment according to the principles of criminal law and to the sound feelings of the people, will be punished." Reichsgesetzblatt (1935) I Art 1, quoted in S Glueck, The Nuremberg Trial and Aggressive War (1946) at 73.

[11] "I fear that today's opinion sends an erroneous message to those facing the disciplinary process that if they dare to challenge the charges against them, the consequences may be more severe than if they simply confess wrongdoing and pray for mercy. There is something demoralizing and destructive in such a message, and something that violates the very spirit upon which our legal system is premised." *In re Shannon*, 179 Ariz. 52 (1994).

Arizona to read E.R. 1.15 expansively, rather than strictly.[12] They asked the right state agency. The State Bar of Arizona dismisses strict construction of penal statutes as "nonsensical:"

> Implicit in Gilchrist's insistence upon 'strict construction' is the notion that the text of a statute, and nothing more, informs its application. This is nonsensical. Every law student, Gilchrist included, necessarily learns that the judicial interpretation given statutes is often dispositive of the meaning attached to a statute, and sometimes far more important than the text of the statute itself. In this instance, the comment to E.R. 1.15 demonstrates why Gilchrist's conduct constituted a violation of that E.R. 1.15.

State Bar Defendants' Ninth Circuit Brief, p. 23.

The State Bar of Arizona's analysis confounds the American form of government, the Preamble to the state regulatory laws at issue,[13] and a large body of United States Supreme Court precedent.

---

[12] "I was unable to find a specific E.R. addressing this issue but feel that the Rules For Professional Conduct must take into consideration such issues of professionalism and common decency in the actions of members of the bar toward clients and/or former clients." Gary S. Engle, certified legal specialist, Arizona Board of Legal Specialization, Dkt 1, para. 93.

[13] "The comments are intended as guides to interpretation, but the text of each rule is authoritative." Rule 42, Ariz.R.S.Ct., Preamble, Scope.

It is an ancient rule of statutory construction that penal[14] statutes should be strictly construed against the government or parties seeking to enforce statutory penalties, and in favor of the persons on whom penalties are sought to be imposed. *See e.g. United States v. Fruit Growers Ex. Co.*, 279 U.S. 363, 369 (1929); *Prussian v. United States*, 282 U.S. 675, 677 (1931); *McBoyle v. United States*, 283 U.S. 25, 27 (1931); *United States v. Scharton*, 285 U.S. 518, 521-22 (1932); *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 285 (1978); *Busic v. United States*, 446 U.S. 398, 407 (1980). "The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself." *United States v. Wiltberger*, 5 Wheat (18 U.S.) 76, 93 (1820).

Bar disciplinary proceedings are quasi-criminal in nature. *In re Ruffalo*, 390 U.S. 544, 551 (1968), *reh'g denied*, 391 U.S. 961; *In Re Wilson*, 106 Ariz. 34, 470 P.2d 441, 442 (1970). Respondents are therefore entitled to procedural due process, *In re Hoover*, 155 Ariz. 192, 745 P.2d 939, 943 (1987), and disciplinary rules must be read strictly, resolving any ambiguity in favor of the person charged. *U.S. v. Brown*, 72 F.3d 25, 29 (5th Cir. 1995); *Matter of Thalheim*, 853 F.2d 383, 388 (5th Cir. 1988).

The State Bar of Arizona's "case-by-case" method of statutory construction is precisely what American law enforcement is *not* supposed to do.[15] Nonetheless, in the border

---

[14] Discipline and penalties account for Rules 46-68, Ariz.R.S.Ct.

[15] "[S]tatutory construction [that] is allowed to degenerate into fact-specific, case-by-case criminalization . . . broadcasts to the law-enforcement community a potent message: the limits of official coercion are not fixed; the suggestion box is always open. The result is that law-making devolves to law enforcement, and police and prosecutors are

district of Arizona, case-by-case construction is the unchecked rule of law. In addition to violating five Constitutional clauses, Arizona's "zero-tolerance" approach to statutory construction violates the common law doctrine of strict construction.

Arizona's "zero-tolerance" policies are patently unconstitutional.

II: Do Article III courts ever abstain in favor of patently unconstitutional state action?

First, abstention is forbidden where the state proceedings are patently unconstitutional. *See Gibson v. Berryhill*, 411 U.S. 564, 577-79 (1973). Second, throughout American history, acts repugnant to the Constitution have been considered null and void.[16] Compelling reasons for abstaining

---

invited to play too large a role in deciding what to punish." Jeffries, Legality, Vagueness, and the Construction of Penal Statutes, 71 VA. L. REV. 189, 223 (1985).

[16] "A law violating a constitution established by the people themselves, would be considered by the Judges as null and void." James Madison, 2 Farrand, The Records of the Federal Convention of 1787, 93, note 23.

"The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no ex-post-facto laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing." Alexander Hamilton, Federalist No. 78, 1788.

"Where powers are assumed which have not been delegated, a

in favor of the null and void do not readily appear. Third, Defendants' entire legal process was conducted in violation of their own jurisdictional mandate.[17] Abstention is precluded where the state tribunal is acting beyond its authority. *Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535, 541 (9th Cir. 1994), *cert. denied*, 133 L.Ed.2d 203. Fourth, the State Bar Defendants manipulated their state action, for purposes of obtaining federal abstention. (*See* due process/*nunc pro tunc* section above, p., 14; Petitioner's Ninth Circuit brief, pp. 48-50). As a matter of policy, the federal judiciary should never abstain in favor of manipulated state action. Finally, this is a First Amendment case. Abstention is particularly inappropriate in First Amendment cases. *See Ripplinger v. Collins*, 868 F.2d 1043, 1056 (9th Cir. 1989). This First Amendment case involves an *ex post facto* quasi-criminal process, in which speech was both forced and abridged. (Dkt. 1, paras. 95-100).

---

nullification of the act is the rightful remedy." --Thomas Jefferson: Draft Kentucky Resolutions, 1798. ME 17:386.

"Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument." *Marbury v. Madison*, 1 Cranch 137 (1803).

" It follows from these views that no State upon its own mere motion can lawfully get out of the Union; that resolves and ordinances to that effect are legally void, and that acts of violence within any State or States against the authority of the United States are insurrectionary or revolutionary, according to circumstances." Abraham Lincoln's First Inaugural Address (1861).

[17] Rule 49 (c)(1), Rules of Supreme Court: "Bar counsel shall investigate all information coming to the attention of the state bar which, if true, would be grounds for discipline or transfer to disability inactive status." Dkt. 1, para. 116

Article III abstention on these facts disregards the very purpose of § 1983:

> The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights -- to protect the people from unconstitutional action under color of law, 'whether that action be executive, legislative or judicial.'

Mitchum v. Foster, 407 U.S. 225, 242 (1972).

III. Do state bar executives and the private citizens that motivate them enjoy absolute immunity from Petitioner's 1983 and diversity claims?

A. Do state bar executives enjoy greater constitutional immunity than the President of the United States?

Section 1983 is a critical part of American law.[18] It was passed by the Reconstruction Congress in 1871, and no Congress since has ever added an immunity provision to the Act.[19] Consequently, this Court only reads in common law immunities that existed prior to 1871. In this case, there is no evidence that state bar associations or their agents were immune

---

[18] "It would be difficult to imagine a statute more clearly designed 'for the public good' and 'to prevent injury and wrong' than § 1983." *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 73 (1989)(Brennan, J., dissenting.).

[19] Section 1983 "creates a species of tort liability that on its face admits of no immunities." *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976).

from suit at common law in 1871.

Even when this Court identifies a pre-1871 common law immunity, it weighs "whether § 1983's history or purposes nonetheless counsel against recognizing the same immunity in § 1983 actions." *Tower v. Glover*, 467 U.S. 914, 920 (1984). Common sense counsels against judicially amending the Civil Rights Act of 1871 to give lawyers in modern state government *carte blanche* to violate the Constitution of the United States.

Lawyers possess specialized training that gives them the power and temptation to manipulate the American justice system for their own ends. *Shapero v. Kentucky Bar Ass'n.*, 486 U.S. 466, 489 (1988)(O'Connor, J., dissenting, joined by Rehnquist, C.J., and Scalia, J.). Giving government lawyers license to freely violate America's highest law would increase their power and temptations immeasurably, and leave a significant contingent of state actors absolutely unchecked by federal government.

When policy considerations permit, this Court next applies a "functional" test to absolute immunity claims. The Court examines "the nature of the function performed, not the identity of the actor who performed it." *Forrester v. White*, 484 U.S. 219, 229 (1988). The District Court found the functional test difficult to apply:

> It is difficult for the Court to make that functional evaluation in this case since it is not at all clear from the complaint exactly what these three defendants allegedly did to violate the plaintiff's constitutional rights.

Dkt. 58, p. 18, lines 18-21.

The complaint is the wrong place to look for proof on any affirmative defense, let alone absolute immunity from the Constitution of the United States. The proper judicial response where immunity is unclear is to deny the motion to dismiss. *See Buckley v. Fitzsimmons*, 509 U.S. 259, 281 (1993)("[I]f application of the principle is unclear, the defendant simply loses." Scalia, J. concurring, citation omitted). The District Court responded by shifting the burden of proof to Petitioner.

While the District Court at least mentioned this Court's functional test, the Ninth Circuit replaced it with *Clark v. State of Washington*, 366 F.2d 678 (9th Cir. 1966). *Clark* was decided in 1966, and preceded all of this Court's decisions requiring historical and functional analysis. The Ninth Circuit's reliance on *Clark* disregards 45 years of more recent Supreme Court precedent. *Clark* must be overruled.

Clark is also distinguishable. The Plaintiff in *Clark* was tried before a trial committee that entered findings of fact and conclusions of law. *Clark*, 366 F.2d at 679 (9th Cir. 1966). The Petitioner here was investigated, exonerated, and then convicted, without notice, by a panel of one. Petitioner was informed of his 'trials' and their outcomes well after-the-fact. (*See* due process/*nunc pro tunc* section above, p., 14). *Clark* is further distinguishable as a case brought solely against state government; no individuals were named. *Clark*, 366 F.2d at 679 (9th Cir. 1966). Consequently, *Clark* has never stood for the Ninth Circuit's proposition that "bar association prosecuting attorneys are immune from damages." (Ninth Circuit's unsigned, unpublished decision, Appendix, p. 3).

In summary, absolute immunity is an affirmative defense. "The official seeking absolute immunity bears the burden of showing that such immunity is justified for the function in question." *Burns v. Reed*, 500 U.S. 478, 486 (1991), *citing*

Forrester v. White, 484 U.S. 219, 224 (1988); *Malley v. Briggs*, 475 U.S. 335, 340 (1986); *Harlow v. Fitzgerald*, 457 U.S. 800, 812 (1982); *Butz v. Economou*, 438 U.S. 478, 506 (1978). The District Court shifted the burden of proof, and found that Petitioner's Complaint failed to plead facts sufficient to negative an affirmative defense.[20] The Ninth Circuit affirmed, and swapped its own opinion for those of this Court. By dropping both this Court's historical inquiry and its functional test, the Ninth Circuit has judicially rewritten an Act of Congress.[21]

B. Do private citizens who motivate state action enjoy absolute immunity from suit under 42 U.S.C. § 1983?

The District Court dismissed Petitioner's 1983 claims against the Dieterle-Engle defendants without discussion. (Dkt. 58). The Ninth Circuit affirmed, relying on a *state* court of appeals' decision, and a *state* immunity statute. Appendix, p. 3. In doing so, both courts disregarded this Court's "concerted action,"[22] "nexus,"[23] and "symbiotic relationship"[24] doctrines, all

---

[20] "Proof is the duty of the affirmative side. A negative cannot be positively proved." --Thomas Jefferson to Martin Van Buren, 1824. ME 16:55.

[21] 42 U.S.C. § 1983; Civil action for deprivation of rights.
(a) no change
(b) Notwithstanding the foregoing, state actors licensed to practice law shall enjoy absolute immunity from this Act, regardless of function.

[22] "Private persons, jointly engaged with state officials in the prohibited action, are acting 'under color' of law for purposes of the statute. To act 'under color' of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents." *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970), *quoting, United States v. Price*, 383 U.S. 787, 794 (1966). Petitioner specifically alleged that the Defendants acted in concert: "B E & D were

holding private citizens liable for the unconstitutional state strings they pull. As private citizens, the Dieterle-Engle defendants are not entitled to even qualified immunity. *Wyatt v. Cole*, 504 U.S. 158 (1992); *Richardson v. McKnight*, 521 U. S. 399 (1997); *F.E. Trotter, Inc. v. Watkins*, 869 F.2d 1312, 1318-19 (9th Cir. 1989).

C. Does Arizona's immunity statute protect Respondents from Petitioner's diversity claims?

The lower courts gave all Respondents absolute immunity from Petitioner's diversity claims under a state law authored by the Arizona Supreme Court. Rule 54(l) gives legal protection to everyone but the accused, in a quasi-criminal process:

> Immunity From Civil Suit. Communications to the court, state bar, commission, hearing committees or hearing officers, mediators, the peer review committee, monitors of the Membership Assistance or Law Office Management Assistance Programs, probable cause panelists or bar counsel relating to lawyer misconduct, lack of professionalism or disability and testimony given in the proceedings shall be absolutely privileged conduct, and no civil action predicated thereon may be instituted against any complainant or witness. Members

---

acting in concert, in furtherance of a common plan and design . . .." (Dkt. 1, para. 146).

[23] *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974).

[24] *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961).

> of the board, commission, hearing committees or hearing officers, mediators, the peer review committee, monitors of the Membership Assistance or Law Office Management Assistance Programs, probable cause panelists, bar counsel and staff shall be immune from suit for any conduct in the course of their official duties.

Rule 54(l), Ariz.R.S.Ct. (Emphasis added).

Rule 54(l) is facially invalid, and represents a purposeful discrimination between classes of persons. Complainants and witnesses can speak freely, while Respondents can not. The chilling effect on Petitioner's forced written speech in this case was anything but trivial.[25] The unequal protections of the Arizona Supreme Court's immunity law are so glaring that none of the Respondents have ever quoted it in their pleadings. The lower courts erred in giving Respondents immunity from Petitioner's diversity claims under Rule 54(l).

IV. Is the Arizona Supreme Court sufficiently connected to its bar association to be enjoined when association personnel violate the Constitution of the United States?

The Ninth Circuit concluded that the Arizona Supreme

---

[25] Prior to their frivolous bar complaint, the highly litigious (Dkt. 1, paras. 32-34) Dieterles sued Petitioner for a non-existent cause of action (Dkt. 1, para. 54), and accused him of libel and slander. (Dkt. 1, paras. 69, 102). With the assistance of their Certified Legal Specialist, they also blackmailed Petitioner (*See* Dkt. 1, paras. 73-76, *see also* 18 U.S.C. § 875, 876) and threatened to sue him for punitive damages. (Dkt. 1, para. 73).

Court is not sufficiently connected to its bar association to be enjoined when association personnel violate the United States Constitution. Appendix, p. 4. The panel's fact conclusion is contradicted by this Court,[26] the Ninth Circuit itself,[27] the Arizona Supreme Court,[28] the State Bar of Arizona,[29] and

---

[26] "We cannot agree that the actions of the committee [on character and fitness] can be divorced from the Supreme Court's exercise of its sovereign powers. The Court's opinion in *Bates v. State Bar of Arizona*, 433 U.S. at 360 is directly pertinent. . . . [T]he appellant's claims are against the State. The Arizona Supreme Court is the real-party-in-interest; it adopted the rules, and is the ultimate trier of fact and law in the enforcement process. *In Re Wilson*, 106 Ariz. 34, 470 P.2d 441 (1970). Although the State Bar plays a role in the enforcement of the rules, its role is completely defined by the courts; the [State Bar] acts as the agent of the Court under its continuous supervision." *Hoover v. Ronwin*, 466 U.S. 558, 572 (1984), *citing Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

[27] The Ninth Circuit cited Rule 31(a)(1), and several other Arizona Rules of Supreme Court in *Wade v. State Bar of Arizona*, 948 F.2d 1122 (9th Cir. 1991). While analyzing a portion of the bankruptcy code, the Court concluded that "[t]hese rules demonstrate that the Arizona Supreme Court exercises a significant degree of control over the Bar's disciplinary proceedings." *Wade*, 948 F.2d at 1124.

[28] The Arizona Supreme Court's own rule requires it to direct and control its Bar Association: "*Establishment of State Bar*. In order to advance the administration of justice . . . the Supreme Court of Arizona does hereby perpetuate, create and continue under the direction and control of this court an organization known as the State Bar of Arizona." Rule 31(a)(1), Ariz.R.S.Ct., (Emphasis added).

[29] "The Rules of the Arizona Supreme Court give it the ultimate power over the practice of law in this state, although the power to discipline persons engaged in the practice of law is delegated, to a certain extent, to the State Bar of Arizona. Ariz. Supreme Court Rule 31(a)." Dkt. 18, pp. 6-7.

Petitioner's fact allegations,[30] all of which establish the Arizona Supreme Court's legal responsibility for the state actors that enforce its regulatory laws. The Arizona Supreme Court and its chief justice are unquestionably subject to equitable relief under *Ex Parte Young*, 209 U.S. 123 (1908), and *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719 (1980).

V. Were the proceedings below so far departed from the accepted and ususal course of judicial proceedings to call for an exercise of this Court's supervisory power?

At the time it was filed, Petitioner's Complaint included 30 pages of sworn fact testimony, and nearly 300 pages of supporting documentation. Although the Ninth Circuit requires 1983 actions to be pled extensively, the District Court's first act was to strike Petitioner's documentation from the record: "It is ordered that all of the exhibits attached to the complaint are stricken from the record." (Dkt. 4 , p. 2, Appendix, p. 29). The District Court thereafter trivialized Petitioner's "unsupported" fact allegations: ". . . the plaintiff's unsupported allegations, the gist of which seem to be . . . do not as a matter of law suffice to rebut the presumption." (Dkt. 58, p. 12, Appendix, p. 16).

After rejecting Petitioner's facts "as a matter of law," the District Court filled the void with more law, specifically the Rules of the Arizona Supreme Court.[31] The difference between

---

[30] Dkt. 1, para. 166.

[31] "The Rules of the Arizona Supreme Court, e.g. rule 53 (General Procedure in Discipline Matters), regulating the formal manner in which State Bar disciplinary proceedings are instituted, conducted, and reviewed clearly make the proceedings judicial in character." Dkt 58, p. 9, Appendix, p. 14. "The State Bar disciplinary process is clearly

law and fact is often a wide one.[32] The Rules of the Arizona Supreme Court define a process; they do not guaranty it will be followed. Moreover, rules of court are laws, not facts.

While the District Court swapped Petitioner's presumed true fact testimony for facts of its own making, the Ninth Circuit skipped Petitioner's fact allegations altogether: "[t]he district court properly dismissed Gilchrist's ex post facto claim because Gilchrist failed to allege that the state bar rules were applied to him retroactively." Actually, Petitioner repeatedly alleged that the state bar rules were applied to him retroactively:

> Plaintiff has alleged that defendants' one-time expansion of E.R. 1.15 is tantamount to a bill of attainder, applied retroactively. (VC paras. 84-95, 183 b). Bills of attainder and *ex post facto* laws violate Article I, §10 of the United States Constitution. While effectively re-writing E.R. 1.15 and applying it retroactively, defendants acted legislatively, and were subject to the same Article-I restrictions that bind the United States Congress and other legislators.

Dkt. 35, p. 8, lines 11-18, *citing* Dkt. 1, paras. 84-95, 183 b.

One wonders if the Ninth Circuit's protocol in civil

---

quasi-judicial in nature, and functions involving investigating disciplinary charges, initiating disciplinary charges, weighing evidence, making factual determinations, determining sanctions, and issuing written decisions are clearly tasks functionally comparable to duties performed by courts and prosecutors." Dkt. 58, p. 19, Appendix, p. 22-33.

[32] *See also Lochner v. New York*, 198 U.S. 45 (1905)(Oliver Wendell Holmes dissenting: "General propositions do not decide concrete cases.").

rights cases includes reading the pleadings. There is really no way of knowing: "Unfortunately, the processes by which appeals are actually decided in each circuit are generally not well known, and they have not been sufficiently studied." Long Range Plan for the Federal Courts, Chapter 6, Adjudication, p. 67 (1995).

CONCLUSION

The writ should be granted.[33]

August 1, 2001

DAVID GILCHRIST
210 Hauoli Street
Wailuku, Hawaii USA 96793
(808) 986-0908

[33] "No nation can answer for perfect exactitude of proceedings in all their inferior courts. It suffices to provide a supreme judicature where all error and partiality will be ultimately corrected." --Thomas Jefferson to George Hammond, 1792. ME 16:255. *But see* Abraham Lincoln's Second Inaugural Address (1865): "With high hope for the future, no prediction in regard to it is ventured."

APPENDIX

FILED
MAR 26 2001
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

U.S. COURT OF APPEALS

FOR THE NINTH CIRCUIT

DAVID GILCHRIST, Plaintiff-Appellant, v. ARIZONA SUPREME COURT; THOMAS A. ZLAKERT, Chief Justice; STATE BAR OF ARIZONA; DON BIVENS, husband; PATRICIA LEE REFO, wife; JOHN BERRY, husband; BARBARA LOU BERRY, wife aka Jane Doe Berry; ROBERT SWARTZ, husband; APRIL SWARTZ, wife aka Jane Doe Swartz; GARY S. ENGLE; SUSAN M. ENGLE, wife; FREDERICK J. DIETERLE, husband; JUDY DIETERLE, wife, Defendants-Appellees.	No. 00-15739 D.C. No. CV99-629-99-00629-PGR MEMORANDUM[1]

[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

Appeal from the United States District Court
for the District of Arizona
Paul G. Rosenblatt, District Judge, Presiding

Submitted March 12, 2001[2]

Before: WALLACE, NOONAN, and W. FLETCHER, Circuit Judges.

David Gilchrist appeals pro se the district court's dismissal of his 42 U.S.C. § 1983 action alleging that the Arizona state bar disciplinary rules are unconstitutional as applied to him. We have jurisdiction pursuant to 28 U.S.C. § 1291. We review de novo the district court's dismissal for lack of subject matter jurisdiction and immunity under the Eleventh Amendment, *see Olson Farms, Inc. v. Barbosa*, 134 F.3d 933, 936 (9th Cir. 1998) (lack of subject matter jurisdiction); *Yakama Indian Nation v. Wash. Dep 't of Revenue*, 176 F.3d 1241, 1245 (9th Cir. 1999) (Eleventh Amendment immunity), and we affirm.

The district court was unsure whether the state bar disciplinary proceedings had been completed at the time of its order. If the proceedings were completed, the district court properly dismissed Gilchrist's claims for declaratory and injunctive relief under the *Rooker-Feidman* doctrine because Gilchrist's claims are inextricably intertwined with the state bar's decision. *See District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462,483 n.16 (1983); *Dubinka v. Judges of Superior Court*, 23 F.3d 218, 222 (9th Cir. 1994) (holding that a claim is inextricably intertwined when the district court must

[2] The panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

scrutinize both the challenged rule and the state's application of that rule).

If the state bar disciplinary proceedings were still pending, the district court properly dismissed Gilchrist's declaratory and injunctive relief under the *Younger* abstention doctrine because federal courts are required to abstain from interfering with pending state actions. *See Younger v. Harris*, 401 U.S. 37, 40 (1971); *Middlesex County Ethics Comm. v. Garden State Bar Ass 'n*, 457 U.S. 423, 432 (1982).

The district court properly dismissed Gilchrist's claims for monetary damages against the Arizona Supreme Court, its chief judge, and the state bar association because they are entitled to immunity under the Eleventh Amendment. *See Clark v. Washington*, 366 F.2d 678, 681 (9th Cir. 1966).

The district court properly dismissed Gilchrist's claims for monetary damages against the state bar attorneys. *See id.* (stating that bar association prosecuting attorneys are immune from damages).

Because parties who initiate a complaint with the state bar are absolutely immune from suit, the district court properly dismissed Gilchrist's damages claim against his former clients and their attorney. *See Ashton-Blair v. Merrill*, 187 Ariz. 315, 317 (1997); Ariz. Sup. Ct. R. 54(1).

To the extent that Gilchrist argued that Arizona Supreme Court Rule 54(1) is unconstitutional, the contention lacks merit. *See Martinez v. California*, 444 U.S. 227, 282 n.5 (1980)(stating that the state may create immunities that effectively eliminate state cause of action as long as they are not arbitrary or irrational).

The district court properly dismissed Gilchrist's claim for equitable relief because Gilchrist failed to demonstrate that the Arizona Supreme Court and its chief justice are sufficiently connected to his disciplinary proceedings. *Cf Supreme Court of Va. v. Consumers Union of United States,* Inc., 446 U.S. 719, 736 (1980) (stating that defendants are sufficiently connected when they have independent authority to initiate proceedings against attorneys).

The district court properly dismissed Gilchrist's *ex post facto* claim because Gilchrist failed to allege that the state bar rules were applied to him retroactively. *See United States v. Arzate-Nunez*, 18 F.3d 730, 733 (9th Cir. 1994) (holding that the ex post facto clause bars any law which imposes a penalty for an act innocent when done).

The district court did not err in dismissing Gilchrist's bill of attainder claim because the disciplinary rules were not enacted solely against Gilchrist, and he was provided with due process protections at the disciplinary proceedings. See *Fresno Rifle & Pistol Club, Inc. v. Van De Kamp*, 965 F.2d 723, 727 (9th Cir. 1992).

The district court properly dismissed Gilchrist's claim that the defendants violated his right to free speech because the defendants are entitled to immunity. *See Clark*, 336 F.2d at 681; Ariz. Sup. Ct. R. 54(1).

AFFIRMED.

_x_ FILED ____ LODGED
___ RECEIVED ___ COPY

MAR 08 2000

CLERK UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA
By s/DS DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

David Gilchrist,	) JUDGMENT IN A CIVIL
	) CASE
	)
Plaintiff,	) CIV 99-0629 PHX PGR
v.	)
	)
The Arizona Supreme Court, et al.,	)
	)
	)
Defendants	)
	)

____ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

_X_ Decision by Court. This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED by way of this Court having granted Defendants Motions to Dismiss, Plaintiff shall take nothing, this action and complaint are hereby dismissed.

March 8, 2000

RICHARD H. WEARE
District Court Executive/Clerk

s/Kathleen W. Garchey
(By) Deputy Clerk

cc: (all counsel)

_x_ FILED ____ LODGED
___ RECEIVED ___ COPY

MAR 08 2000
CLERK UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA
By s/DS DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

David Gilchrist, Plaintiff, v. The Arizona Supreme Court, et al., Defendants	)	No. CIV 99-0629 PHX PGR ORDER

Pending before the Court are Defendants Gary S. Engle and Susan M.. Engle's Motion to Dismiss (doc. 115), State Bar Defendants' Motion to Dismiss or, Alternatively, to Strike Plaintiff's Complaint (doc. #18), Defendants the Arizona Supreme Court and Chief Justice Thomas A. Zlaket's Motion to Dismiss (doc. #19), Defendants Frederick J. Dieterle and Judy Dieterle's Motion to Dismiss (doc. #34), and the plaintiff"s Motion for Leave to Amend (doc. #35). Having considered the memoranda filed in connection with the pending motions and

the oral argument of counsel and of the pro se parties, the Court finds that this action should be dismissed in its entirety without leave to file an amended complaint.

The plaintiff, a practicing attorney appearing pro se in this action, has sued the Arizona Supreme Court and Chief Justice Zlaket (the Supreme Court defendants), the State Bar of Arizona, bar president Don Bivens and spouse, chief bar counsel John Berry and spouse, and bar attorney Robert Swartz and spouse (the State Bar defendants), former client Frederick Dieterle and spouse, and the Dieterles' attorney Gary Engle and spouse, for their actions in subjecting the plaintiff to a State Bar disciplinary action. The plaintiff raises federal question claims pursuant to § 1983 due to alleged facial and as applied unconstitutionality of certain Arizona Supreme Court rules related to disciplinary actions, and state tort claims based on diversity for defamation, abuse of process, and negligence; the complaint seeks nominal, compensatory and punitive damages, and "[s]uch declaratory and injunctive relief regarding Rules 49(c)(1), 51(h) and (i), Rule 53(b)(1), and Rule 54(l), Ariz.R.S.Ct., as the Court deems just and proper." No specific injunctive or declaratory relief is requested. The claims arise from an ethics complaint that Engle filed with the State Bar on the Dieterles' behalf concerning the plaintiff is conduct involving a fee dispute with Dieterle. A State Bar probable cause specialist, finding that the plaintiff had violated E.R. 1.15 1. 15, entered an order of Informal Reprimand, Probation and Costs against the plaintiff on September 1, 1999; the order informally reprimanded the plaintiff, placed him on probation until he had attended a one-day Ethics Enhancement Program, and imposed $300 in coats.[3]

[3] The probable cause finding stated: You and Mr. Dieterle signed a fee agreement which included a provision for a lien over the entire settlement of his claim. However, at the time the agreement was signed,

Although the Court has no difficulty in concluding that the various claims advanced by the plaintiff should be all dismissed, it is difficult for the court to determine on what basis it should dismiss those claims given the unclear state of the record as to the status of the State Bar disciplinary proceedings and any administrative and/or judicial appeals from those proceedings.[4] The primary problem lies in whether the Court is being asked to enjoin an ongoing state disciplinary proceeding, in which case the Younger abstention doctrine is applicable, or whether the Court is being asked to review the merits of a final state disciplinary ruling, in which case the Rooker-Feldman doctrine is applicable. H. C. v. Koppel, _ F.3d _, 2000 WL 145979 at *2 (9th Cir. 2/11/00). In order to resolve this issue, the Court will rule in the alternative. Rooker-Feldman Doctrine

Rooker-Feldman Doctrine

the amount of your legal fees was not quantifiable nor could you determine what, if any, settlement would be reached. once your client's case was settled, you were entitled to a portion of that settlement; the portion equal to your actual fees. As you are undoubtedly aware, your client disputed the amount you ultimately claimed as your fee. In an effort to secure your fee without addressing Mr. Dieterle's concerns, you orchestrated a plan which would prevent the client from ever receiving any portion of his funds without first paying your fee. By claiming a lien on the entire settlement, an amount which was ten times the amount of your fees, and preventing the distribution of any portion of those funds, you violated E.R. 1.15.

[4] It appears from the record that the plaintiff has paid the $300 in costs, but it is unclear from the record whether the plaintiff has completed the ethics course. It does not appear from the record that the plaintiff has utilized any of the appeal procedures made available by Ariz.Sup.Ct.R. 53.

The plaintiff stated during oral argument that he did not know if the State Bar disciplinary proceeding was then still pending.

Some of the defendants argue that, to the extent that the State Bar disciplinary proceeding has been completed without any appeal being taken, this action should be dismissed pursuant to the jurisdictional bar of the Rooker-Feldman doctrine. The Court agrees.

Under the Rooker-Feldman doctrine, a federal district court does not have subject matter jurisdiction to review federal or state law claims, including constitutional challenges seeking damages and injunctive or declaratory relief, that are inextricably intertwined with the underlying state court decision. Courts have consistently concluded that the Rooker-Feldman doctrine is generally applicable to collateral attacks on attorney disciplinary proceedings because such proceedings are generally judicial in nature. District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 479, 103 S.Ct. 17 1.303, 1313 (1983). Such proceedings are considered judicial in nature even if they just involve state bar proceedings. Narey v. Dean, 32 F.3d 1521, 1525 (11th Cir. 1994) ("The defendants correctly note that the Rooker-Feldman doctrine has been applied to state bar 21 proceedings."); Samuel v. Michaud, 980 F.Supp. 1381, 1414 (D.Id. 1996), aff'd, 129 F.3d 127 (9th Cir, 1997)("[T]he court notes that the Rooker-Feldman doctrine applies here because the state bar is an arm of the state courts, and the state bar disciplinary hearing is judicial in nature and effect."). In short, the Rooker-Feldman doctrine has been said to have "eliminate[d] most avenues of attack on attorney discipline." Johnson v. Supreme Court of Illinois, 165 F.3d 1140, 1141 (7th Cir.), cert. denied, 120 S.Ct. 271 (1999). The Ninth Circuit has noted that the distinction between a permissible general constitutional challenge and an impermissible appeal of a state court determination "may be subtle, and difficult to make", Worldwide Church of God v. McNair, 805 F.2d 888, 891 (9th Cir. 1986), and that "[c]ourts have generally concluded that claims are inextricably intertwined when the district court must

scrutinize both the challenged rule and the state court's application of that rule." Dubinka v. Judges of Superior Court, 23 F.3d 218, 222 (9th Cir. 1994). Notwithstanding that no party has made any concerted effort to analyze the "inextricably intertwined" issue, the Court concludes that all of the plaintiffs' claims are inextricably intertwined with the State Bar proceeding.

Although the plaintiff superficially alleges in his complaint that some of the Arizona Supreme Court's rules governing attorney discipline are facially unconstitutional, the gravamen of his federal claims is that the State Bar disciplinary proceeding against him is unconstitutional and all of his claimed injuries appear to stem from the application of allegedly unconstitutional rules to his disciplinary proceeding. Looking behind the general constitutional claims in order to examine the real object of the suit, the Court cannot conclude that the facial unconstitutionality allegations can be analyzed independently of the disciplinary proceeding itself since the plaintiff is essentially attacking the investigative procedures and the motives for those procedures, i.e. the discernible core of his general constitutional attacks cannot properly be said to stand independently of his personal situation. It appears to the Court that granting any of the relief requested would in effect require a determination that the State Bar decision as to the validity of the ethics complaint is wrong or would void that decision, which is a determination barred by the Rooker-Feldman doctrine.

The fact that the plaintiff has also brought state law defamation, abuse of process, and negligence claims pursuant to diversity jurisdiction, apparently against the State Bar defendants, the Dieterles, and the Engles ("BE&D"), does not make the Rooker-Feldman doctrine any less applicable - the issue is still whether those claims are inextricably intertwined with the State Bar's decision to discipline the plaintiff while the

plaintiff cannot litigate his state law claims as part of the disciplinary process the underlying basis for the state law claims is the alleged impropriety of the disciplinary charges. For example, in the defamation claim, the plaintiff alleges that BE&D falsely questioned the plaintiff's fitness as a lawyer and falsely accused him of being unprofessional by falsely accusing him of violating various E.R. 1.15's, including 1.15, 1.16(d), 3.2, 8.4(c) and (d); in the abuse of process claim, the plaintiff alleges that BE&D manipulated the Arizona Supreme Court rules for the improper purpose of retaliation, defamation, and financial harassment; and in the negligence claim, the plaintiff alleges that B E & D, and apparently also the Arizona Supreme Court, breached their duty of due care to him in part by violating his constitutional rights, falsely accusing him of ethical violations, and violating and/or improperly using the Arizona Supreme Court disciplinary rules. In order to find in favor of the plaintiff on these claims, the State Bar's finding that the plaintiff in fact committed an ethical violation would have to be found to have been made in error, which would violate the Rooker-Feldman doctrine.

Younger Abstention

Most of the defendants argue that this action should be dismissed under the abstention doctrine of Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746 (1971). "Younger generally directs federal courts to abstain from granting injunctive or declaratory relief that would interfere with pending state judicial proceedings." Martinez v. Newport Beach City, 125 F.3d 777, 781 (9th Cir. 1997). To the extent that the Court's jurisdiction to entertain this action is not barred by the Rooker-Feldman doctrine because the state disciplinary proceeding is not yet finalized, the Court concludes that it should abstain from adjudicating the plaintiff's federal claims for injunctive and/or declaratory relief.

The difficulty in resolving the Younger issue is that it is not clear to the Court, from either the complaint or the plaintiff's comments at oral argument, what kind of injunctive relief or declaratory relief, if any, the plaintiff is really seeking, or whether such relief, even if it was proper when this action was filed, is now still proper given further developments in the state disciplinary proceeding.

There is no doubt that the Younger abstention doctrine can be appropriately applied when the underlying state proceeding is a state bar disciplinary proceeding, even if a First Amendment claim is being raised. The Supreme Court, citing to Middlesex Count Ethics Committee v. Garden State Bar Assn., 457 U.S. 423, 102 S.Ct. 2515 (1982), has noted that "we have held that federal courts should refrain from enjoining lawyer disciplinary proceedings initiated by state ethics committees if the proceedings are within the appellate jurisdiction of the appropriate State Supreme Court." Ohio Civil Rights Comm'n, 477 U.S. 619, 627, 106 S.Ct. 2718, 2723 (1986); accord, Partington v. Gedan, 961 F.2d 852, 861 (9th Cir.) (Partington II), cert. denied, 506 U.S. 999 (1992) ("[The Younger doctrine] also applies to state bar disciplinary proceedings."

> Absent "extraordinary circumstances", abstention in favor of state judicial proceedings is required if the state proceedings (1) are ongoing, (2) implicate important state interests, and (3) provide the plaintiff an adequate opportunity to litigate federal claims.

Hirsh c. Justices Of Supreme Court of State of California, 67 F.3d 708, 712 (9th Cir. 1995) (Internal citations omitted).

As to the first Younger factor, it is undisputed that the plaintiff was facing an ongoing State Bar disciplinary

proceeding when he filed this action. Although the plaintiff conclusorily states that the bar proceedings were never "judicial", the Supreme Court has affirmed Younger abstention to a challenge to the constitutionality of disciplinary rules that were the subject of a pending state disciplinary proceeding under the jurisdiction of the New Jersey Supreme Court, noting that the bar disciplinary proceedings were of a character to warrant federal court deference since they were judicial in nature. Middlesex County Ethics Committee v. Garden State Bar Association, 457 U.S. at 433-34, 102 S.Ct. at 2522 (1982); accord, Hirsh, 67 F.3d at 712; Partington v. Gedan, 880 F.2d 116, 122 (9th Cir. 1989)(Partington I), cert denied, 497 U.S. 1038 (1990), and cert. granted and vacated on other grounds, 497 U.S. 1020 (1990). The Rules of the Arizona Supreme Court, e.g. Rule 53 (General Procedure in Discipline Matters), regulating the formal manner in which State Bar disciplinary proceedings are instituted, conducted, and reviewed clearly make the proceedings judicial in character.

Although the plaintiff argues that abstention is not appropriate because the State Bar's Order of Informal reprimand, Probation and Costs against him has ended the disciplinary proceedings, the actions of the State Bar after the plaintiff filed this action are irrelevant in determining if Younger abstention applies since the only relevant factor is whether the state proceeding was ongoing when the federal suit was filed. Beltran v. State of California, 871 F.2d 777, 782 (9th Cir. 1988) ("'In other words, Younger abstention requires that the federal courts abstain when state court proceedings were ongoing at the time the federal action was filed.... Although the state court proceedings were completed by the time the district court granted summary judgment, and an abstention order in this case may result simply in the appellees refiling their federal complaint, this outcome is required by Younger."); Confederated Salish v. Simonich, 29 F.3d 1398, 1402 (9th Cir.

1994) ("In the Younger context, these factors are static. A district court's perception of the appropriateness of abstaining will not be affected by the progress of the state court proceeding.") Furthermore, the State Bar proceeding would be considered to be ongoing for Younger purposes to the extent that the plaintiff has not exhausted his state appellate remedies. Dubinka v. Judges of the Superior Court, 23 F.3d at 223 ("The Supreme Court has held that Younger abstention applies to prevent federal intervention in a state judicial proceeding in which a losing litigant has not exhausted his state appellate remedies. Huffman v. Pursue. Ltd., 420 U.S. 592, 607-11, 95 S.Ct. 1200, 1209-12, 43 L.Ed.2d 482 (1975). Therefore, even if appellants' trials were completed at the time of the district court"s decision [regarding abstention], the state court proceedings were still pending for Younger abstention purposes.")

As to the second Younger factor, Supreme Court and Ninth Circuit case law clearly establishes, and the plaintiff does not contend otherwise, that attorney discipline is an important state interest. Middlesex County Ethics Committee, 102 S.Ct. at 2522 ("The State of New Jersey has an extremely important interest in maintaining and assuring the professional conduct of the attorneys it licenses."); accord, Hirsh, 67 F.3d at 712 ("California's attorney disciplinary proceedings implicate important state interests.")

As to the third Younger factor, this is met if the federal plaintiff can raise his constitutional claims either in the state administrative proceedings or in a state judicial review of the administrative proceedings, Partington I, 880 F.2d at 124, and the opportunity to raise constitutional challenges in a state disciplinary proceeding is inadequate only when state procedural law bars presentation of the federal claims. Hirsh, 67 F.3d at 713.

The plaintiff, who bears the burden of showing that state procedural law barred his from raising his federal claims in the state disciplinary action, Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 14, 107 S.Ct. 1519, 1528 (1987); Lebbos v. Judges of Superior Court, Santa Clara County, 883 F.2d 810, 816 (9th Cir. 1989), has not done so.[5] The plaintiff does, however, argue that the State Bar is biased against him and such allegations are normally resolved under this prong since a biased tribunal does not provide an adequate opportunity to litigate federal claims. Partington I, 880 F.2d at 121. For Younger purposes, (b]ias exists where a court has prejudged, or reasonably appears to have prejudged, an issue[,]" Kenneally v. Lungren, 967 F.2d 329, 333 (9th cir. 1992), cert. denied, 506 U.S. 1054 (1993), and one alleging bias "must overcome a presumption of honesty and integrity in those serving as adjudicators[.] Id. (quoting Withrow v. Larkin, 421 U.S. 35, 47, 95 S.Ct. 1456, 1464 (1975). Although this presumption can be rebutted by a showing of conflict of interest or some other specific reason for disqualification, Partington I, 880 F. 2d at 124, the plaintiff's unsupported allegations, the gist of which seem to be that the State Bar must discipline a certain number of attorneys every year for public relation purposes, that the State bar picks on unknown sole practitioners like himself to discipline, and that the State Bar does everything it can to protect its certified specialists like defendant Engle, do not as a matter of law suffice to rebut the presumption.

[5] It does not appear from the allegations in the complaint that the plaintiff made any real attempt to raise his constitutional challenges in the disciplinary proceeding. As the Supreme Court has noted, "when a litigant has not attempted to present his federal claims in related state-court proceedings, a federal court should presume that state procedures will afford an adequate remedy, in the absence of unambiguous authority to the contrary." Pennzoil Co. v. Texaco, Inc., 107 S.Ct. at 1528.

The plaintiff also argues, in an essentially conclusory manner, is that Younger abstention is not appropriate because the exceptions to the doctrine are applicable here because he has "alleged that the very state proceedings at issue were unconstitutional. Plaintiff has alleged that the Bar's investigation was instituted in bad faith, that it was patently unconstitutional, and that the Bar is biased. Finally, Plaintiff has alleged that the Bar defendants acted beyond their authority."

Although a federal court is normally required to abstain if the three prongs of the Younger test are satisfied, abstention is inappropriate if the federal plaintiff can establish (1) that the state proceedings are being undertaken in bad faith or for purposes of harassment, or (2) that some other "extraordinary circumstances" exist, such as that the proceedings are pursuant to a "flagrantly and patently" unconstitutional statute. Partington I, 880 F.2d at 128.

The fact that the plaintiff has alleged that the State Bar disciplinary procedures are unconstitutional is not in and of itself a sufficient ground upon which to base a determination that abstention is inappropriate. As the Supreme Court has noted, "we have repeatedly rejected the argument that a constitutional attack on state procedures themselves automatically vitiates the adequacy of those procedures for purposes of the Younger-Huffman line of cases." Ohio Civil Rights Commission v. Dayton Christian Schools. Inc., 477 U.S. at 628, 106 S.Ct. at 2723.

The plaintiff's allegations that the bar's investigation was instituted in bad faith

> fall far short of establishing bad faith of the sort sufficient to invoke that [Younger abstention] exception. There was no allegation of repeated,

> harassment by enforcement authorities with no intention of securing a conclusive resolution by an administrative tribunal or the courts or of pecuniary bias by the tribunal.

Partington II, 961 F.2d at 861-62 (Internal citations omitted). The complaint itself alleges that this is the only disciplinary action ever instituted against the plaintiff by the State Bar, and it is clear from the record that the State Bar entered its initial disciplinary order some ten months after the ethics inquiry began. See also, Crenshaw v. Supreme Court of Indiana, 170 F.3d 725, 729 (7th Cir.), cert. denied, 120 S.Ct. 173 (1999) ("In order to establish her entitlement to the bad faith exception to the Younger doctrine, [the plaintiff] must allege specific facts to support her inferences of bad faith, bias, and retaliation. She must present more then mere allegations and conclusions.")

The plaintiff's allegations that the State Bar's investigation was patently unconstitutional are also insufficient to bar abstention even if he is assumed to have raised some colorable constitutional arguments since this aspect of the Younger exception applies only when the state statute or procedural rule at issue is "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence, and paragraph, and in whatever manner and against whomever an effort might be made to apply it." Younger v. Harris, 401 U.S. at 53-54, 91 S.Ct. at 755; Partington I, 880 F.2d at 128. The plaintiff has made no such showing with regard to the Arizona Supreme Court rules governing disciplinary proceedings, and the Court concludes that he cannot make any such showing.

Although ordinarily a decision to abstain under Younger results in a dismissal of the federal action, see Gibson v. Berryhill, 411 U.S. 564, 577, 93 S.Ct. 1689, 1697 (1973) ("Younger v. Harris contemplates the outright dismissal of the

federal suit, and the presentation of all claims, both state and federal, to the state courts."); Beltran v. State of California, 871 F.2d at 782 ("Where Younger abstention is appropriate, a district court cannot refuse to abstain, retain jurisdiction over the action, and render a decision on the merits after the state proceedings have ended. To the contrary, Younger abstention requires dismissal of the federal action.") (emphasis in original), the Court notes that the applicability of Younger abstention to the plaintiff's monetary claims is not clear under current Supreme Court and Ninth Circuit precedent. See Martinez v. Newport Beach City, 125 F.2d 777, 783 (9th Cir. 1997) (The Court, in concluding that it need not decide under the circumstances of that case whether the Younger abstention may ever be applied to a § 1983 suit for damages, noted: "[W]e are faced with conflicting signals. While Ninth Circuit precedent sends the clear signal that the applicability of Younger abstention to §1983 causes of action (for money damages] is disfavored, Supreme Court precedent on whether or not abstention is proper in an action under § 1983 (for money damages] is unclear at best.") The Court need not resolve this issue, however, because the plaintiff's federal monetary claims are subject to dismissal on other grounds.

IMMUNITY

The Eleventh Amendment bars § 1983 suits in federal courts against a state or its agencies, regardless of the nature of the relief sought, unless the state unequivocally consents to a waiver of its immunity. Yakama Indian Nation v. Washington Dept. of Revenue, 176 F.2d 1241, 1245 (9th Cir. 1999), cert. denied, 120 S.Ct. 935 (2000); the Eleventh Amendment also immunizes states, their agencies, and their officials sued in their official capacity from suit in federal court on state law claims. Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 106, 104 S.Ct. 900, 911 (1984). The Eleventh Amendment does

not bar actions in federal court against state officials, regardless of the nature of the relief sought, sued in their individual capacities. Native Village of Noatak v. Blatchford, 38 F.3d 1505, 1512 (9th Cir. 1994).

The only Eleventh Amendment issue that the Court need decide concerns the State Bar's argument that the Eleventh Amendment bars the plaintiff's suit as to it.[6] The State Bar argues, and the Court agrees, that the suit against it should be dismissed because it is the functional equivalent of a suit against the state. The plaintiff does not argue that the State Bar is not a state agency for purposes of the Eleventh Amendment; what he argues, in a cursory manner, is that the State Bar's Eleventh Amendment immunity has been waived by the fact that the Arizona Supreme Court, in its Rule 31(a) (1), has granted the State Bar "sue and be sued" authority.[7] However, in order to constitute a waiver for Eleventh Amendment purposes, "[t]he state's consent must be unequivocally expressed, meaning that the consent is effective only where stated by the most express language." Id. (Internal quotation marks and citations omitted).

[6] The only Eleventh Amendment defense raised by the Arizona Supreme Court and Justice Zlaket in his official capacity is that the Eleventh Amendment bars the plaintiff's claims for money damages against them, and they have dropped that issue based upon the plaintiff's assertion in his response that he is suing the Supreme Court and Zlaket only for equitable relief, and not for damages (notwithstanding that his complaint reads as if he is suing them for damages).

The Court, based upon the plaintiff's response to the individual State bar defendants' motion to dismiss, concludes that they are being sued only in their individual capacities.

[7] Ariz.R.Sup.Ct. 31(a) (1) provides in part: "The State Bar of Arizona may sue and be sued, may enter into contracts and acquire, hold, encumber, dispose of and deal in and with real and personal property[.] "

A "sue and be sued" provision is not in and of itself sufficient to constitute such a waiver. See Belanger v. Madera Unified School Dist., 963 F.2d 248, 254 (9th Cir. 1992), cert. denied, 507 U.S. 919 (1993) ("It is undisputed that California school districts can sue and be sued in their own name. ... Thus, ... this factor militates against a finding of Eleventh Amendment immunity. However, it does not necessarily follow that the school district can be sued f or money damages just because it can be sued in its own name. If a school district is a state agency for purposes of the Eleventh Amendment, suits against the district in its own name are subject to the same Eleventh Amendment constraints as suits against the State.) Rule 31 (a) (1) is not an "unequivocal consent" to Eleventh Amendment waiver since it is clear from other Arizona Supreme Court rules, such as Rule 54 (1), the absolute immunity provision, and other state statutes, such as ARS § 12-820.01, the absolute immunity statute for public entities acting in a judicial or legislative function, that Arizona has not waived its Eleventh Amendment immunity from § 1983 actions.

The fact that the plaintiff has also brought state law claims against the State Bar pursuant to diversity jurisdiction is irrelevant since an arm or alter ego of the state is not a citizen for purposes of diversity jurisdiction. Moor v. County of Alameda, 411 U.S. 693, 717, 93 S.Ct. 1785, 1800 (1973).

The State Bar defendants argue that they are absolutely immune from the plaintiff's § 1983 claims for damages, whether it be by judicial immunity, quasi-judicial or prosecutorial immunity, or legislative immunity, for their roles as enforcers of the Arizona Rules of Professional Conduct, Ariz.Sup.Ct.R. 42. As the proponents of a claim to absolute immunity, they have the burden of establishing the justification for such immunity. Antoine v. Byers & Anderson. Inc., 508 U.S. 429, 432, 113 S.Ct. 2167, 2169 (1993).

Since § 1983 contains no official immunity defense on its face, the Supreme Court has applied a functional approach to determine whether a state official charged with constitutional violations should be entitled to absolute immunity for monetary liability, i.e., the Supreme Court looks to the nature of the function performed and not the identity of the actor who performed it in order to determine if the function is one which would have been protected by absolute common law immunity when Congress enacted § 1983 in 1871. Buckley v. Fitzsimmons, 509 U.S. 259, 268-69, 113 S.Ct. 2606, 2613 (1993); Mishler v. Clift, 191 F.3d 998, 1002 (9th Cir. 1999). The issue here is whether Bivens, the State Bar's president, Berry, the State Bar's chief counsel, and Swartz, the State Bar attorney who initially handled the disciplinary complaint against the plaintiff, functioned in a judge-like capacity or in a prosecutor-like capacity sufficiently enough to be entitled to quasi-judicial or quasi-prosecutorial immunity, which were common law immunities recognized in 1871.

It is difficult for the Court to make that functional evaluation in this case since it is not at all clear from the complaint exactly what these three defendants allegedly did to violate the plaintiff's constitutional rights; most of the plaintiff's allegations are general ones about how the "State Bar" mistreated him, as opposed to specific allegations about the individual State Bar defendants. In his response, the plaintiff argues that Bivens, Berry, and Swartz did not function as judges or prosecutors during the disciplinary process, but rather as executives, administrators, and investigators, i.e. that Bivens acted as the State Bar's chief executive officer, that Berry, the chief bar counsel, acted as an administrator and executive official, and that Swartz, the bar attorney, acted as an investigator.

The State Bar disciplinary process is clearly

quasi-judicial in nature, and functions involving investigating disciplinary charges, initiating disciplinary charges, weighing evidence, making factual determinations, determining sanctions, and issuing written decisions are clearly tasks functionally comparable to duties performed by courts and prosecutors. Mishler v. Clift, 191 F. 3d at 1004 (Ninth Circuit concluded that members of the Nevada State Board of Medical Examiners were absolutely immune from § 1983 damages actions for their quasi-judicial role in the disciplinary hearing process.) The Ninth Circuit has several times held that members of bar association grievance committees enjoy absolute immunity because the nature of the functions performed by them, i.e. prosecuting and adjudicating claims of professional misconduct, are an integral part of the judicial process. Richardson v. Koshiba, 693 F.2d 911, 914 (9th Cir. 1982); Clark v. State of Washington, 366 F.2d 678, 681 (9th Cir. 1966); Samuel v. Michaud, 980 F.Supp. 1381, 1416 (D.Id. 1996), aff'd, 129 F.3d 127 (9th Cir. 1997).

In this case, the Court concludes that the federal claims against the individual State Bar defendants are barred because they were either acting in a quasi-judicial or a quasi-prosecutorial role in the plaintiff Is disciplinary process, or because the plaintiff is attempting to impose respondeat superior liability on them, particularly on Bivens and Berry, which does not exist in a § 1983 action. The Court further concludes that all of the defendants are immune from all of the state law diversity claims pursuant to Arizona law. The Arizona Supreme Court and the State Bar are immune from any state law damages claims arising from the individual State Bar defendants' handling of the disciplinary proceeding pursuant to ARS § 12-820.01 (A) (1) ("A public entity shall not be liable for acts and omissions if its employees constituting: (1) The exercise of a judicial or legislative function[.]")

The individual defendants are immune from the state tort claims arising from their actions related to the initiation or prosecution of the ethics complaint pursuant to Ariz.Sup.Ct.R. 54(l)[8] . The Dieterles and the Engles are also immune pursuant to Arizona a common law. Drummond v. Stahl, 127 Ariz. 122, 126, 618 P.2d 616, 620 (App. 1980), cert. denied, 450 U.S. 967)1981) ("In our opinion, public policy and legal precedent compel us to adopt the position that there is an absolute privilege extended to anyone who files a complaint with the State Bar alleging unethical conduct by an attorney.")

Although the plaintiff's alleges in his complaint that Ariz.Sup.Ct.R. 54(l) is facially unconstitutional because it violates the Equal Protection Clause by giving "absolute legal protection to people who file false Bar Complaints, but no protection at all to the attorneys they defame[,]" and is unconstitutional as applied to him because it violates his free

[8] Rule 54(l) provides absolute immunity from civil suit for persons involved in initiating or prosecuting disciplinary actions:

> Communications to the court, state bar, commission, hearing committees or hearing officers, mediators, the peer review committee, monitors of the Membership Assistance or Law Office Management Assistance Programs, probable cause panelists or bar counsel relating to lawyer misconduct, lack of professionalism or disability and testimony given in the proceedings shall be absolutely privileged conduct, and no civil action predicated thereon may be instituted against any complainant or witness. Members of the board, commission, hearing committees or hearing officers, mediators, the peer review committee, monitors of the Membership Assistance or Law Office Management Assistance Programs, probable cause specialists, bar counsel and staff shall be immune from suit for any conduct in the course of their official duties.

speech and due process rights, the Court concludes that Rule 54(l) is constitutional.

The Supreme Court has clearly established that states may create immunities which effectively eliminate state causes of action, subject only to the requirement that their action not be arbitrary or irrational. Martinez v. State of California, 444 U.S. 277, 282, 100 S.Ct. 553, 557 (1980) (In rejecting a Fourteenth Amendment challenge to a state law granting absolute immunity to public employees who make parole release determinations, the Supreme Court stated: "But even if one characterizes the immunity defense as a statutory deprivation, it would remain true that the State's interest in fashioning its own rules of tort law is paramount to any discernible federal interest, except perhaps an interest in protecting the individual citizen from state action that is wholly arbitrary or irrational."); accord, Ferri v. Ackerman, 444 U.S. 193, 198, 100 S.Ct. 402, 406 (1979)("For when state law creates a cause of action, the State is free to define the defenses to that claim, including the defense of immunity, unless, of course, the state rule is in conflict with federal law.") Relying upon supreme court precedent indicating that the right to practice law is not a fundamental right for purposes of due process or equal protection analysis, see e.g., Leis v. Flynt, 439 U.S. 438, 442 n.5, 99 S.Ct. 698, 701-02 n.5 (1979), the courts that have specifically considered the constitutionality of state rules or statutes absolutely immunizing those involved in attorney disciplinary proceedings have upheld them as being rationally related to a legitimate state interest. See e.g., Edelstein v. Wilentz, 812 F.2d 128, 133 (3rd Cir. 1987)("In short, the New Jersey Supreme Court made a policy judgment that the imposition of the absolute immunity rule for ethics complainants was justified by the need to maintain and increase public confidence in the bench and the bar. We cannot say that the position taken by the New Jersey Supreme Court is irrational.

The choice of the absolute immunity rule represents a reasoned policy choice directed to the legitimate state goal of effective regulation of attorney conduct. This is sufficient to uphold the Rule against Edelstein's equal protection challenge.")[9] ; accord, Jarvis v. Drake, 830 P.2d 23, 28 (Kan. 1992) ("The purpose of Supreme Court rule 223 is to encourage the members of the public to file complaints against attorneys who have violated the rules of ethics. It is rationally related to the objective of effectively regulating the conduct of the bar, which in turns protects the public interest. Thus, Supreme Court Rule 223 is not unconstitutional as a violation of the equal protection guarantee of the Untied States Constitution.") See also Drummond v. Stahl, 127 Ariz. at 126, 618 P.2d at 620 ("Drummond makes a further argument that any action by the State of Arizona by either legislative enactment or judicial decision to grant an absolute privilege [to peoples initiating bar ethics complaints] would amount to state action depriving Drummond of due process of law and equal protection of the laws(.] ... We have been cited to no reported cases supporting such a theory and have been unable to find any such cases. The existence of such an absolute privilege has been upheld by the majority of states that have considered this issue, and we see no validity to this challenge on constitutional grounds.")

Also pending before the court is the State Bar defendants' alternative motion to strike the plaintiff's 44-page complaint as being violative of Fed.R.Civ.P. 8(a). Apparently in response, the plaintiff has requested leave to file an amended complaint and he has attached a copy of a proposed 13-page

[9] Although the plaintiff argues that the Edelstein case isinapposite because the New Jersey immunity rule had a confidentiality provision that is lacking in Rule 54(l), the presence of the confidentiality provision was not a controlling factor in the Third Circuit's affirmation of the constitutionality of the immunity rule.

amended complaint, which he describes as a "shorter, plainer" complaint.[10] The Court finds that the motion to strike should be denied as moot and that the request to amend should be denied because the proposed amendment would be futile as a matter of law for the reasons stated above.

Therefore,

IT IS ORDERED that Defendants Gary S. Engle and Susan M. Engle's Motion to Dismiss (doc. #15), State Bar Defendants' Motion to Dismiss and Joinder in Motions to Dismiss Filed by Other Defendants (doc. #18-1 and #18-3), Defendants the Arizona Supreme Court and Chief Justice Thomas A. Zlaket's Motion to Dismiss (doc. #19), and Defendants Frederick J. Dieterle and Judy Dieterle's Motion to Dismiss (doc. #34), are all granted to the extent stated herein.

IT IS FURTHER ORDERED that State Bar Defendants, (Alternative Motion) to Strike Plaintiff's Complaint (doc. #18-2) is denied as moot.

IT IS FURTHER ORDERED that the plaintiff's Motion for Leave to Amend (doc. #35) is denied as futile.

IT IS FURTHER ORDERED that the Clerk of the Court shall enter judgment accordingly.

Dated this 6th day of March, 2000.

s/Paul G. Rosenblatt
Paul G. Rosenblatt
United States District Judge

[10] The proposed amended complaint adds two new defendants: the State Bar attorney who made the probable cause finding in the plaintiff's disciplinary case, and his spouse.

_x_ FILED ____ LODGED
___ RECEIVED ___ COPY

APR 15 1999
CLERK UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA
By s/DS DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

David Gilchrist,	)	
	)	
Plaintiff,	)	No. CIV 99-0629 PHX PGR
v.	)	
	)	ORDER
The Arizona Supreme Court,	)	
et al.,	)	
	)	
Defendants	)	
	)	

On April 1, 1999, the plaintiff filed a complaint that had attached to it almost 300 pages of exhibits; the exhibits consist mainly of attorney correspondence, pleadings from court and administrative proceedings, and medical records. The Court sua sponte finds that the inclusion of the exhibits as part of the complaint violates Fed. R. Civ. P. 8 (a) and that the exhibits should be stricken pursuant to Fed.R.Civ.P. 12(f).

Fed.R.Civ.P. 10(c) authorizes the incorporation of writings attached to a pleading and makes them a part of the

pleading for all purposes. Nevertheless, evidence pleading, as distinguished from the pleading of ultimate facts, is not favored under the Federal Rules and courts may properly strike unnecessary evidentiary detail from pleadings. In re Beef Industry Antitrust Litigation, 600 F.2d 1148, 1168-69 (5th Cir. 1979); accord, Control Data Cory). v. International Business Machines Corp., 421 F.2d 323, 326 (8th Cir. 1970) ("It has long been basic to good pleading that evidentiary matters be deleted. Such deletion does not control the question of materiality and relevancy governing evidentiary use."); Burch v. Apalachee Community Mental Health Services. Inc., 840 F.2d 797, 811 n.2 (11th Cir. 1988) (Tjoflat,j., et al., dissenting) ("Such exhibits [to the complaint] are best characterized as evidence of the allegations presented in the typed complaint, and evidentiary matter of this kind can and should be deleted from the pleadings.") ; Wright & Miller, Federal Practice and Procedure: Civil 2d S1327 at 763 (1990) (II[L]engthy exhibits containing extraneous or evidentiary material should not be attached to the pleadings.") Therefore,

IT IS ORDERED that all of the exhibits attached to the complaint are stricken from the record.

IT IS FURTHER ORDERED that the plaintiff shall immediately make arrangements with the Docketing Section of the Clerk's Office, at (602) 514-7102, to either retrieve, at no cost to the Court, the stricken exhibits or to have the Clerk of the Court destroy the stricken documents, and the plaintiff shall file with the Court no later than April 30, 1999 a notice affirming that he has either retrieved the stricken documents or has given the Clerk permission to destroy the stricken documents.

IT IS FURTHER ORDERED that the plaintiff shall immediately provide the defendants with a copy of this order if

service of process has already been effectuated.

Dated this 14th day of April, 1999.

s/Paul G. Rosenblatt
Paul G. Rosenblatt
United States District Judge

FILED
MAY21 1999
STATE BAR OF ARIZONA
BY s/Elena Farris

BEFORE THE PROBABLE CAUSE PANELIST

OF THE STATE BAR OF ARIZONA

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA,	No. 98-1005
David J. Gilchrist, Bar No. 011492	Frederick & Judy Dieterle
Respondent.	ORDER OF INFORMAL REPRIMAND, PROBATION AND COSTS

The undersigned Probable Cause Panelist of the State Bar, having reviewed this matter pursuant to Rule 53(b), Ariz.R.S.Ct., finds that probable cause exists to believe that respondent has violated Rule 42, Ariz.R.S.Ct., to wit:

You and Mr. Dieterle signed a fee agreement which included a provision for a lien over the entire settlement of his claim. However, at the time the agreement was signed the amount of your legal fees was not quantifiable nor could you determine what, if any, settlement would be reached. Once your client's case settled you were entitled to a portion of that settlement; the portion equal to your actual fees. As you are undoubtedly aware, your client disputed the amount you ultimately claimed as your fee. In an effort to secure your fee without addressing

Mr. Dieterle's concerns, you orchestrated a plan which would prevent the client from ever receiving any portion of his funds without first paying your fee. By claiming a lien on the entire settlement, an amount which was ten times the amount of your fees, and preventing the distribution of any portion of those funds, you violated E.R. 1.15.

IT IS THEREFORE ORDERED that:

(1) Pursuant to Rules 52(a)(5) and 53(b), Ariz.R.S.Ct., respondent is informally reprimanded for such conduct.

(2) Pursuant to Rules 52(a)(6) and 53(b), Ariz.R.S.Ct., respondent is hereby placed on probation under the following terms and conditions:

(a) Respondent shall attend a one-day Professional Enhancement Program and shall be responsible for the attendance fee. Respondent must contact Yigael M. Cohen, Director of Lawyer Regulation, State Bar of Arizona, (602) 340-7244, within 20 days from the date this order is mailed;

(b) The period of probation shall be in effect until such time as respondent has completed the one-day Professional Enhancement Program;

(c) Respondent shall report, in writing, his compliance with the terms of probation to the State Bar's Phoenix office;

(d) If respondent fulls to comply with any of the foregoing conditions, and information thereof is received by the State Bar, bar counsel shall file with the probable cause panelist a Notice of Non-Compliance. The probable cause panelist shall determine whether the conditions of probation have been breached and, if so, to order appropriate action and response to such breach. If

there is an allegation that respondent has fulled to comply with any of the foregoing conditions, the burden of proof thereof shall be on the State Bar to prove non-compliance by a preponderance of the evidence.

(3) Pursuant to Rules 52(a)5 and 54(k)4, this order will be entered in the respondent's permanent record at the State Bar, and pursuant to Rule 61(a)(2), is not confidential. It may also be considered by a hearing officer or committee, the Disciplinary Commission or the Supreme Court in recommending or imposing discipline in a subsequent disciplinary proceeding against respondent.

IT IS FURTHER ORDERED, pursuant to Rule 52(a)(8), Ariz.R.S.Ct., that the costs and expenses of these proceedings in the sum of $300 are imposed against respondent, payable within twenty (20) days after receipt of this order.

DATED this 19 day of May, 1999.

s/Kirk v. Karman
Kirk v. Karman
Probable Cause Panelist
State Bar of Arizona

Copies mailed this 15th day
of June, 1999, to:

David J. Gilchrist
Attorney at Law
3523 Malina Place
Kihei, HI 96753-9240

Yigael M. Cohen
Director of Lawyer Regulation

111 West Monroe, Suite 1800
Phoenix, AZ 85003

by: s/Donna J. Westfall
JNS:dfw

FILED
SEP 01 1999
STATE BAR OF ARIZONA
BY s/Elena Farris

BEFORE THE PROBABLE CAUSE PANELIST

OF THE STATE BAR OF ARIZONA

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA,	)	No. 98-1005
	)	Frederick &
David J. Gilchrist,	)	Judy Dieterle
Bar No. 011492	)	
	)	ORDER
	)	VACATING
Respondent.	)	INFORMAL
	)	REPRIMAND,
	)	PROBATION
	)	AND COSTS

The undersigned Probable Cause Panelist of the State Bar, having reviewed a request to vacate the Order of Informal Reprimand, Probation and Costs, concludes that the Order of Informal Reprimand, Probation and Costs entered in this matter on May 19, 1999 should be vacated for cause shown and in the interest of justice, pursuant to Rule 55(i), Ariz.R.S.Ct.

IS THEREFORE ORDERED that the Order of Informal Reprimand, Probation entered on May 19, 1999, is hereby vacated.

IT IS FURTHER ORDERED that a separate Order of Informal Reprimand, Probation and Costs be issued in this matter nunc pro tunc to May 19, 1999.

DATED this 1st day of September, 1999.

s/Nicholas Wallwork
Nicholas Wallwork
Probable Cause Panelist
State Bar of Arizona

Copies mailed this 2nd day of
September, 1999, to:

David J. Gilchrist, Esq.
3523 Malina Place
Kihei, HI 96753-9240

by: s/J. Lundberg
JNS:jll

FILED
SEP 01 1999
STATE BAR OF ARIZONA
BY s/Elena Farris

BEFORE THE PROBABLE CAUSE PANELIST

OF THE STATE BAR OF ARIZONA

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA,	)	No. 98-1005
	)	Frederick &
David J. Gilchrist,	)	Judy Dieterle
Bar No. 011492	)	
	)	ORDER OF
Respondent.	)	INFORMAL
	)	REPRIMAND,
	)	PROBATION
	)	AND COSTS
	)	(NUNC PRO
	)	TUNC)

The undersigned Probable Cause Panelist of the State Bar, having reviewed this matter pursuant to Rule 53(b), Ariz.R.S.Ct., finds that probable cause exists to believe that respondent has violated Rule 42, Ariz.R.S.Ct., to wit:

You and Mr. Dieterle signed a fee agreement which included a provision for a lien over the entire settlement of his claim. However, at the time the agreement was signed the amount of your legal fees was not quantifiable nor could you determine what, if any, settlement would be reached. Once your client's case settled you were entitled to a portion of that settlement; the portion equal to your actual fees. As you are undoubtedly aware, your client disputed the amount you ultimately claimed

as your fee. In an effort to secure your fee without addressing Mr. Dieterle's concerns, you orchestrated a plan which would prevent the client from ever receiving any portion of his funds without first paying your fee. By claiming a lien on the entire settlement, an amount which was ten times the amount of your fees, and preventing the distribution of any portion of those funds, you violated E.R. 1.15.

IT IS THEREFORE ORDERED that:

(1) Pursuant to Rules 52(a)(5) and 53(b), Ariz.R.S.Ct., respondent is informally reprimanded for such conduct.

(2) Pursuant to Rules 52(a)(6) and 53(b), Ariz.R.S.Ct., respondent is hereby placed on probation under the following terms and conditions:

(a) Respondent shall attend a one-day Ethics Enhancement Program. Respondent must contact Yigael M. Cohen, Director of Lawyer Regulation, State Bar of Arizona, (602) 340-7250, within 20 days from the date this order is mailed;

(b) The period of probation shall be in effect until such time as respondent has completed the one-day Ethics Enhancement Program.

(c) Respondent shall attend the Ethics Enhancement Program within nine (9) months from the original order of May 19, 1999.

(d) If respondent fails to comply with the foregoing conditions, or otherwise objects to any other terms of this order within 20 days of the date this order is mailed, this order will then be vacated and an order of probable cause shall be entered pursuant to Rule 53(b)5, Ariz.R.S.Ct.

(3) Pursuant to Rules 52(a)5 and 54(k)4, this order will be entered in the respondent's permanent record at the State Bar and, pursuant to Rule 61(a)(2), is not confidential. It may also be considered by a hearing officer or committee, the Disciplinary Commission or the Supreme Court in recommending or imposing discipline in a subsequent disciplinary proceeding against respondent.

IT IS FURTHER ORDERED, pursuant to Rule 52(a)(8), Ariz.R.S.Ct., that the costs and expenses of these proceedings in the sum of $300.00 are imposed against respondent, payable within twenty (20) days after receipt of this order. The State Bar of Arizona has previously received respondent's payment of $300.00.

THIS ORDER shall be entered *nunc pro tunc* to May 19, 1999.

DATED this 1st day of September, 1999.

s/Nicholas J. Wallwork
Nicholas Wallwork
Probable Cause Panelist
State Bar of Arizona

Copies mailed/hand-delivered this
2nd day of September, 1999, to:

David J. Gilchrist, Esq.
3523 Malina Place
Kihei, Hawaii 96753-9240

Yigael M. Cohen
Director of Lawyer Regulation
State Bar of Arizona
111 West Monroe, Suite 1800

Phoenix, Arizona 85003-1742
by s/ J. Lundberg
JNS:jll

FILED
Oct 29 10 22 AM '99
K. MIYAMURA
CLERK SUPREME COURT

NO. 22785
IN THE SUPREME COURT OF THE STATE OF HAWAI'I

OFFICE OF DISCIPLINARY COUNSEL,	)	CONFIDENTIAL
	)	ODC 9-330-6160
Petitioner,	)	
vs.	)	
DAVID J. GILCHRIST,	)	
Respondent.	)	

ORDER

Upon consideration of the Office of Disciplinary Counsel's ex parte petition for issuance of reciprocal discipline notice under Rule 2.15(b) of the Rules of the Supreme Court of the State of Hawai'i (RSCH), the memorandum, affidavits, and exhibits thereto, Respondent Gilchrist's response to our September 10, 1999 notice and order, and the record, it appears (1) that on May19, 1999, the State Bar of Arizona informally reprimanded Respondent David J. Gilchrist, and (2) RSCH 2.15(c) requires this court to impose the identical discipline upon the attorney unless this court finds .that upon the face of the record upon which the discipline is predicated it clearly appears that (i) the Arizona procedure was so lacking in notice or opportunity to be heard as to constitute a deprivation of due

process, or (ii) there was such an infirmity of proof establishing the misconduct as to give rise to the clear conviction that this court could not, consistent with its duty, accept as final the conclusion on that subject, or (iii) the misconduct established warrants a substantially different discipline in this state. It further appears that based on the record before united States, there is no evidence that Respondent Gilchrist was ever in possession of property in which both he and another person claimed interests, as is required by E.R. 1.15 of the Arizona Rules of Professional Conduct and Rule 1.15(a), (c), and (f) of the Hawai'i Rules of Professional Conduct. Thus, we cannot, consistent with our duty, accept the Arizona Bar's conclusion that Respondent Gilchrist violated Arizona E.R. 1.15. Therefore, IT IS HEREBY ORDERED that the Office of Disciplinary Counsel's ex parte, petition is denied. pursuant to RSCH 2.15(c).

DATED: Honolulu, Hawai'i, October 29, 1999.

s/Ronald T.Y. Moon
RONALD T.Y. MOON
Chief Justice

s/Robert G. Klein
ROBERT G. KLEIN
Associate Justice

s/Steven H. Levinson
STEVEN H. LEVINSON
Associate Justice

s/Paula A. Nakayama
PAULA A. NAKAYAMA
Associate Justice

s/Mario R. Ramil
MARIO R. RAMIL
Associate Justice

FILED
JUL 12 2001
CATHY CATTERSON, CLERK
U.S. COURT OF APPEALS

U.S. COURT OF APPEALS

FOR THE NINTH CIRCUIT

DAVID GILCHRIST, Plaintiff-Appellant, v. ARIZONA SUPREME COURT; et al., Defendants-Appellees.	No. 00-15739 D.C. No. CV99-629-99-00629-PGR ORDER

Before: WALLACE, NOONAN, and W. FLETCHER, Circuit Judges.

Judge W. Fletcher votes to deny the petition for rehearing en banc, and Judges Wallace and Noonan so recommend.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35.

The petition for rehearing en banc is denied.

No further filings shall be accepted in this closed appeal.

CONSTITUTIONAL PROVISIONS

Article I § 10 of the Constitution of the United States provides in pertinent part:

> No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.

The First Amendment of the Constitution of the United States provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fourteenth Amendment of the Constitution of the United States provides in pertinent part:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its

jurisdiction the equal protection of the laws.

The United Nations' Universal Declaration of Human Rights includes the following provision:

> No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

Universal Declaration of Human Rights, Preamble and Article 11, § 2 (1948). *See also* Norway Constitution, Article 97 (17 May 1814); Luxembourg Constitution, Article 14 (17 Oct 1868); Finland Constitution, Section 6a (17 July 1919); Japan-Constitution, Article 39 (3 Nov 1946); South Korea Constitution, Article 13 (17 July 1948); Kuweit Constitution, Article 32 (11 Nov 1962); Constitution of the Republic of Singapore, Article 11, § 2 (16 September 1963); Yemen Constitution, Article 81 (13 March 1973); Syria Constitution, Article 30 (13 March 1973) Sweden Constitution, Article 10 (1 January 1975); Portugal Constitution, Article 18 (2 April 1976); Iran Constitution, Article 169 (24 Oct 1979); Brazil Constitution, Article XL (5 October 1988); Croatia Constitution, Article 31 (Dec 1990); New Zealand Bill of Rights Act 1990, (1990); Tunisia Constitution, Article 13, (1991); Macedonia Constitution, Article 52, § 4 (17 November 1991); Romania Constitution, Article 15 (8 December 1991); Slovenia Constitution, Article 155 (23 December 1991); Congo Constitution, Article 15 (15 March 1992); Yugoslavia Constitution, Article 117 § 1 (27 April 1992); Paraguay Constitution, Article 14 (20 June 1992);Estonia Constitution,

Article 23 (28 June 1992); Madagascar Constitution, Article 13 (19 August 1992); Angola Constitution, Article 36 §§ 3-4 (25 August 1992); Constitution of the Russian Federation, Article 54 (12 December 1993); Armenia Constitution, Article 42 (5 July 1995).

STATUTES

42 U.S.C. § 1983 provides:

Civil action for deprivation of rights.

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

The Arizona quasi-criminal statute known as E.R. 1.15 SAFEKEEPING PROPERTY provides:

> (a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.
>
> (b) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.
>
> (c) When in the course of representation a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interests. If a dispute arises

> concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved.

Rule 54(l) of the Arizona Supreme Court provides:

> Immunity From Civil Suit. Communications to the court, state bar, commission, hearing committees or hearing officers, mediators, the peer review committee, monitors of the Membership Assistance or Law Office Management Assistance Programs, probable cause panelists or bar counsel relating to lawyer misconduct, lack of professionalism or disability and testimony given in the proceedings shall be absolutely privileged conduct, and no civil action predicated thereon may be instituted against any complainant or witness. Members of the board, commission, hearing committees or hearing officers, mediators, the peer review committee, monitors of the Membership Assistance or Law Office Management Assistance Programs, probable cause panelists, bar counsel and staff shall be immune from suit for any conduct in the course of their official duties.

Rule 54(l), Ariz.R.S.Ct. (Emphasis added).

Arizona's criminal code includes a class 2 misdemeanor for nonfeasance in office:

> A.R.S. § 38-443. Nonfeasance in public office; classification. A public officer or person holding a position of public trust or employment who

knowingly omits to perform any duty the performance of which is required of him by law is guilty of a class 2 misdemeanor unless special provision has been made for punishment of such omission.

My Turn
For The Arizona Republic
By Don Bivens
President, State Bar of Arizona
March 15, 1999.

No doubt you have read the headlines about Carmen Fischer, a lawyer accused of having a sexual relationship with her client, a convicted murder. Many people have asked where the State Bar stands on the allegations against Ms. Fischer, and on the code of attorney conduct. As the State Bar President, I wish to weigh in and let the Bar's voice be heard.

The discipline staff at the State Bar of Arizona has opened an investigation into the allegations against Ms. Fischer, and because of that, the Bar cannot comment on Ms. Fischer's particular case. To do so could create a conflict of interest and compromise the fairness of our own impartial investigation.

However, it is important to let the public know how we feel about any lawyer who displays unethical or unprofessional conduct. In regulating attorneys, the Bar's number one goal is to protect the public. The Bar, and the 15,000 fine ethical lawyers who practice in Arizona, have complete disgust for any lawyer whose unethical or unprofessional conduct harms her or his client, and tarnishes the public's perception of our profession and of our justice system. We have zero tolerance for unethical attorneys.

As for our written code of conduct, it is true that the Arizona Supreme Court's ethics rules do not include the specific words that a lawyer cannot have sex with a client. But that does not mean the issue goes unaddressed. The Bar has disciplined attorneys for having sexual relationships with their

clients. Such behavior falls under the historic ethical rule that prohibits conflicts of interest between lawyers and their clients. What's at issue is not the sex act; but whether the attorney-client relationship has been compromised to the client's potential disadvantage.

It is unrealistic to expect the State Supreme Court to write rules listing every conceivable conflict of interest. Compare the concept to our right to free speech, as guaranteed by the U.S. Constitution. When our Founding Fathers authored the First Amendment, they didn't list every possible scenario in which a person is free to express an opinion. Instead, Judges use the Constitution's guarantee of free speech as a measuring stick to decide cases on an individual basis. The same holds true for the Bar, which uses the conflict of interest rule as its guide when examining questionable attorney-client relationships on a case-by-case basis.

Most attorneys in Arizona are excellent, caring counselors who work hard to give their clients a voice in the justice system. But I acknowledge in the legal profession, as in all professions, a few of our colleagues fall short. When that happens, it is the Br's responsibility to take action. If it happens with your attorney, you should file a complaint with the State Bar by calling 602-340-7480. The Bar will investigate and take any and all appropriate disciplinary action. That's our job, to protect the public from the few attorneys who cannot maintain the standards that the rest of Arizona's attorneys demand of themselves.

Dkt. 36, Exhibit 19.
http://www.azbar.org/StateBarInfo/myturn.asp

For Immediate Release
Contact: Matthew Silverman, Director of Communications
Phone: (602) 340-7226 / Pager: (602) 251-7965

Kirk v. Karman Takes Over Leadership of State Bar of Arizona

June 13, 2000 (Phoenix) - Kirk v. Karman, an attorney whose law practice serves people in Pinal County, is about to become the new President of the State Bar of Arizona. Karman's one-year term officially begins June 17, 2000 during the State Bar's annual convention.

As a sole practitioner, Karman runs The Karman Firm, where his legal practice focuses on family law, criminal law and civil litigation. The Karman name is well known throughout Pinal County where Kirk Karman and his father Howard have been practicing for more than 65 years, combined.

Kirk Karman is an active leader in the legal profession. His service on the State Bar Board of Governors dates back to 1992. He is currently Chair of the State Bar Personnel Committee and previously served as a Probable Cause Panelist in the State Bar's discipline system.

Mr. Karman is a former President of the Pinal County Bar Association (1986), served on the Board of Governors of the Arizona Association for Criminal Justice (1989-1990), was a member of the State Bar's Board of Legal Specialization (1988-1992) and also served as a Regional Coordinator of the 1986 Arizona High School Mock Trial Program.

Kirk learned some of his exceptional leadership abilities from his father. Howard Karman was President of the State Bar of Arizona from 1971 to 1972 and President of the Arizona Bar Foundation from 1984 to 1985. The Karman's are the third

father-son team in State Bar history.

A Case Grande, Arizona native, Kirk Karman earned his law degree from the University of Arizona College of Law.

The State Bar of Arizona is a non-profit organization that operates as an arm of the Arizona Supreme Court. The State Bar provides professional development programs for lawyers and legal information for the public. The Bar's 12,000 active members are dedicated to giving the people of Arizona a voice in the justice system.

###

http://www.azbar.org/StateBarInfo/prsc.cfm?ReleaseID=35

. . .

"Being afraid to do the right thing because you want to get re-elected is a valid concern, but that is not always the best way to help this organization succeed." President Kirk v. Karman, Arizona Attorney, July 2000.

"This is where we are with MDP. If we stick our heads in the sand we will be late and have a big problem. In the future looking back, we will think MDP is a normal practice of law just like computers are a part of the practice of law now. If we don't get started, however, we will get left behind and someone else will offer these services. And, of course, I'm interested in lawyers being successful. That is what the State of Arizona is here for." President Kirk v. Karman Arizona Attorney, July 2000.

"I've always enjoyed criminal cases the most, probably because I get a chance to put on a show. I had a client who walked into a convenience store and fatally shot the store clerk. He confessed and was charged with first-degree murder. He was facing the death penalty. At trial, I got his confession suppressed and convinced the jury that he was not guilty. It took the jury only 12 minutes to leave the courtroom, go into the jury room, vote and return to the courtroom to announce the verdict." President Kirk v. Karman, Arizona Business Gazette, August 31, 2000.

"Being a lawyer has changed dramatically over the last 20 years.. . . The result is a deterioration of lawyer behavior and the public perception of lawyers." President Kirk v. Karman, Arizona Attorney, August/September 2000.

"[M]ost lawyers are aware that the State Bar of Arizona has improved its discipline system to the point that our system is the best in the nation." President Kirk v. Karman, Arizona Attorney, August/September 2000.

Media E-Center
For Immediate Release
Contact: Matt Silverman (602)340-7226, pager (602) 251-7965

Nicholas J. Wallwork,
Leading Phoenix Lawyer,
To Become State Bar of Arizona President
June 08, 2001 (PHOENIX) – Nicholas J. Wallwork, managing shareholder of the Phoenix law firm Beshears Muchmore Wallwork, will become president of the State Bar of Arizona June 15 at the State Bar of Arizona's annual convention.

As president, Wallwork will oversee the State Bar's 29-member Board of Governors and work with the Arizona Supreme Court in establishing policies and procedures for the oversight of the legal profession in Arizona. One of the Bar's top priorities is promoting a just society under law and supporting attorneys so they can provide clients a strong voice in the justice system. Wallwork will use his leadership position to emphasize the profession's core values, including integrity, independence, professionalism and a commitment to clients.

Wallwork is highly regarded as a strong and capable leader, well-respected by both the bench and bar in Arizona. He has extensive professional experience in civil litigation, especially of complex and class action cases, including disputes involving technology and commercial matters. He also practices in environmental and toxic tort law and is past chair of the State Bar's Environmental & Natural Resources Law Section and editor in chief of the Arizona Environmental Law Manual.

Recognized for his expertise in technology law and the use of technology to manage complex legal matters, Wallwork has written and spoken extensively and served in numerous leadership positions in those areas. He is the founding Chair of the State Bar of Arizona's Internet, E-commerce & Technology Law section, a longtime member of the State Bar's Technology Task Force and a past member of the Supreme Court's Commission on Technology.

Wallwork graduated from the University of Virginia School of Law. He has lived in Arizona since 1983 with his wife and two children.

About the State Bar
The State Bar of Arizona is a non-profit association that oversees the legal profession. The State Bar provides services and professional development programs for lawyers and legal information for the public. The Bar's 12,000 active members are dedicated to giving the people of Arizona a voice in the justice system.

###

http://www.azbar.org/StateBarInfo/prsc.cfm?ReleaseID=78

TIME LINE

May 26, 1994; Petitioner enters fee agreement with Dieterles.

March 1998, Dieterles pay for services rendered in 1994.

June 12, 1998; State Bar of Arizona begins investigating Petitioner for E.R. 1.15.

October 15, 1998; State Bar of Arizona drops E.R. 1.15.

April 1, 1999; Petitioner files this 1983 suit.

May 17, 1999; Petitioner serves defendants Bivens Berry and Swartz personally with process.

May 19, 1999; Kirk v. Karman signs order convicting Petitioner of violating E.R. 1.15.

June 15, 1999; State Bar of Arizona mails Petitioner a copy of Karman conviction.

June 16, 1999; State Bar Defendants file motion to dismiss.

August 13, 1999; Petitioner files response, noting that Karman conviction leaves no ongoing state proceedings for purposes of abstention.

September 1, 1999; Nicholas Wallwork signs second conviction, creating 'ongoing proceedings.'

September 15, 1999; State Bar Defendants file reply in CV99-629, citing ongoing state proceedings as basis for abstention.